United Nations

Report of the Human Rights Committee

Volume II

General Assembly

Official Records • Fifty-fifth Session
Supplement No. 40 (A/55/40)

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Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The present document contains annexes IX to XII of the report of the Human Rights Committee. Chapters I to VI and annexes I to VIII are contained in volume I.

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A. Communication No. 625/1995, Michael Freemantle v. Jamaica (Views adopted on 24 March 2000, sixty-eighth session)*

Submitted by	Michael Freemantle (represented by Mr. Saul Lehrfreund of the London law firm of Simons Muirhead and Burton)
Alleged victim	The author
State party	Jamaica
Date of communication	16 February 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 March 2000,

Having concluded its consideration of communication No. 625/1995 submitted to the Human Rights Committee by Mr. Michael Freemantle under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. An individual opinion by member Eckart Klein is attached to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Michael Freemantle, who at the time of submission of his communication was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 7, 9, paragraphs 2 to 4, 10, paragraph 1, and 14, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights. The author is represented by Saul Lehrfreund of the London law firm of Simons Muirhead and Burton. On an unspecified date in 1995, the author's death sentence was commuted to life imprisonment. An earlier communication submitted to the Human Rights Committee by Mr. Freemantle was declared inadmissible on 17 July 1992, on the ground that the author had failed to exhaust available domestic remedies, since he had not petitioned the Judicial Committee of the Privy Council for special leave to appeal.

Facts as submitted by the author

2.1 On 1 September 1985, the author was arrested and placed in custody; four days later, he was charged with the murder of one Virginia Ramdas. The author was first tried in 1986, together with a co-defendant, E.M.; the jury failed to reach a unanimous verdict in the author's respect, and a re-trial was ordered. On 19 January 1987, the author was found guilty as charged in the Clarendon Circuit Court and sentenced to death; on 21 January 1987, he appealed to the Court of Appeal, which dismissed the appeal on 4 December 1987. The Judicial Committee of the Privy Council dismissed the author's petition for leave to appeal on 27 June 1994. The offence for which the author was convicted was classified as a capital offence under the Offences Against the Persons (Amendment) Act 1992.

2.2 The prosecution contended that on 29 August 1985, at approximately 11:00 p.m., the author fired into a crowd watching a film in Raymonds, parish of Clarendon, injuring several people, among whom was V. Ramdas who died of gunshot wounds the next day. The prosecution relied primarily on the evidence of two witnesses, A.K. and W.C., who were in the cinema at the time of the incident, as well as the evidence of C.C., whose house had been shot at about 15 minutes after the cinema incident.

2.3 At the initial trial, A.K. had identified the author as the man who shot into the crowd; he also identified E.M. and one C.F. as the author's accomplices. At the re-trial, however, he testified that he had identified Mr. Freemantle as the gunman as a result of pressure put on him by the community of Raymonds (mainly consisting of P.N.P. supporters), as the author was a known supporter of the J.L.P. His evidence for the re-trial was that on the evening in question, he had seen some men including "a man looking like Freemantle", E.M. and C.F. going toward the cinema; the man looking "like Freemantle" carried something like a long gun in his hand; this man approached a hole in the wall; an explosion was heard; the man climbed onto a tree and jumped over the wall onto the lawn. A.K. apparently had known the author for 18 years. The trial transcript reveals that when giving evidence at the re-trial, A.K. was himself in custody on charges of illegal possession of firearms and shooting with intent. He conceded that while in custody, he had seen the author and discussed the case with him; he admitted that there were political differences between himself and the author.

2.4 W.C. testified that he had known the author for 15 years, had seen him jumping over the wall after an explosion, firing twice, and then climbing back over the wall. He saw the author for about a minute, recognizing him in the bright moonlight. C.C. testified that on the evening in question at 11.50 p.m., he was at home, half a mile from the cinema, when he heard stones being thrown at the house. Looking out of a window, he recognized E.M., whom he knew. He then saw the author, whom he had known for 8 to 10 years, pointing a gun at one of the windows and firing. According to C.C., he saw the author for about two minutes. W.C. and C.C. testified that they had no interest in politics.

2.5 The arresting officer, Det. Cpl. Davis, testified that he went to search for the author and E.M. on 30 August 1985. He could not find them and had warrants for their arrest issued. On 2 September 1985, he recognized the author at May Pen Police Station, where he arrested him. Being cautioned, the author replied that he wanted to see his lawyer. Another police office testified that he took the author into custody on 1 September 1985.

2.6 The author made an unsworn statement from the dock, stating that, at the time of the incident, he was at Mineral Heights, watching television with E.M. and several other people. He did not leave the place and went to bed between 12.30 to 1.00 a.m. On 1 September 1985, he was told by a police officer that he was a suspect in a murder case, and was detained at the May Pen Police Station. The following day, he saw Det. Cpl. Davis and asked him why he was being held. Davis ignored him, and charged E.M. with destruction of property. The author claimed that it was not until the afternoon of 4 September 1985 that he was formally arrested and charged with murder; he claims that he was brought before an examining magistrate on 6 September 1985. E.M., also in custody at the time of the re-trial, gave sworn evidence for the defence, corroborating the author's alibi. In cross-examination, he admitted that he had spoken to the author in custody but denied having discussed the case, although they were both arrested and charged in connection with the shooting at Raymonds. He affirmed that, while in custody, he had seen prosecution witness A.K. and added that one Laurel Murray, a cousin of the author, was beaten by inhabitants of Raymonds before the shoot-out.

2.7 In his summing-up, the trial judge admonished the jury not to be influenced by political preferences and suggested that, as far as the author's identification was concerned, they should not rely on the evidence of A.K. He further pointed out that the remaining prosecution witnesses had stated that they were neither involved nor interested in politics (which implies that the credibility of their respective testimonies was considerably greater).

2.8 On appeal, the author's lawyer argued that: (a) the verdict was unreasonable and could not be supported having regard to the evidence and (b) the summing-up on identification was inadequate and failed to emphasize the inherent dangers and possibility of mistakes. In respect of ground (b), the Court of Appeal concluded that "despite the absence of a formal warning there had been no miscarriage of justice". Had the jury been properly directed in the sense that had they been given the necessary warning, they would have come to the same conclusion. Before the Judicial Committee, the main issue to be argued was identification.

2.9 As to the claims under article 14, counsel invokes a statement taken from A.K. by an officer of the Criminal Investigation Branch who visited the author in prison on 25 April 1988. In his affidavit, A.K. states that he and the author had been friends but had developed political

differences. He also states: "I did not see who fired the shots. Earlier that day Laurel Murray was beaten by citizens [...]. He is the cousin of Michael Freemantle. He told them that I was the person who beat him. The police knew that I was not involved [...] On 1 September 1985, I [...] was taken to Det. Cpl. Davis [...]. [He] told me that he knew that I did not beat Laurel Murray [...] He said that since they are telling lies on me I should give a statement saying that Freemantle was the one who fired the shots ... He said that W.C. would give a statement supporting me. I was arrested ... for the wounding of Laurel Murray. I went to court where I saw Freemantle. He told me that he was going to tell Laurel Murray to send me to prison. The case was tried and I was dismissed. [...]. I went to Davis' office where he wrote a statement ... I read it and signed it as true and correct. [...]. In this statement I said that I saw Freemantle fired the shots. I gave this evidence at the first trial of Freemantle. [...] In 1986, I was arrested and charged for shooting with intent by Det. Cpl. Davis. In Jan. 1987, I told [Freemantle] that I gave false evidence at the first trial and that I would be telling the truth at the second trial. Davis told me that if I change my evidence he was going to influence the witnesses to give evidence to convict me. As a result of these threats I gave evidence at Freemantle's re-trial and changed a lot of parts to help him [...]. The evidence I gave at both trials are false. I gave it because of fear and threats by Det. Cpl. Davis".

2.10 On the same day, a statement was taken from the author. He states that in his community he is known as a J.L.P. supporter, and that there is constant conflict between J.L.P. and P.N.P. supporters. He claims to be innocent and that he did not go home on the night of 29-30 August 1985, but that he stayed at Mineral Heights. Much of the author's observations coincide with those made by A.K. in his affidavit.

2.11 On 14 June 1988, the Director of Public Prosecutions forwarded to the Governor-General all materials obtained as a result of the police investigation into A.K.'s allegations. According to counsel, no action was taken by the Governor-General in respect of the DPP's letter. On 29 August 1990, the Jamaica Council for Human Rights contacted a Jamaican lawyer on the author's behalf; this lawyer advised to petition the Governor-General to have the matter referred back to the Court of Appeal of Jamaica; he further stated that legal aid would not be provided, but that he was willing to take the case on.

2.12 As to exhaustion of domestic remedies, it is submitted that a constitutional motion is not available to the author in practice because of his lack of funds and the unavailability of legal aid for this purpose. Counsel recalls the difficulties of finding a lawyer in Jamaica to represent applicants in constitutional motions. The State party's unwillingness to provide legal aid for such motions is said to absolve Mr. Freemantle from pursuing constitutional remedies.

The complaint

3.1 It is submitted that the author did not receive a fair trial within the meaning of article 14, paragraph 1, because the investigating officer who influenced A.K. to implicate the author falsely could have similarly influenced the other main prosecution witnesses, W.C. and C.C. Counsel refers to the Committee's General Comment No. 13, where the Committee held that it is a duty for all public authorities to refrain from prejudging the outcome of a trial.[1] He submits that Det.Cpl. Davis prejudiced the outcome of the author's trial, in violation of article 14, paragraph 2.

3.2 Counsel invokes another sworn affidavit signed by the author on 27 October 1994, in which he notes that he was arrested and taken to May Pen on 1 September 1985, and that he was held in custody for four days before being charged with murder. During this time, he had no access to a lawyer. Counsel contends that there is no justification for a four day delay between the author's detention and his being informed of the charges against him. With reference to the Committee's General Comment No. 8[2] and its jurisprudence,[3] it is submitted that the author's pre-trial detention was contrary to the requirements of article 9, paragraphs 2, 3 and 4.

3.3 As to alleged violations of articles 7 and 10, the author recalls that on 28 May 1990, he and other inmates broke out of their cells because they had not been allowed to exercise and slop up. The disturbances spread to other parts of the prison. Inmates were asked to return to the cells and complied, but subsequently, warders took the author from his cell, took off his clothes, searched him and started to beat him with a piece of metal. He sustained injuries to head, knee, stomach and eyes, having been beaten for about five minutes. He was then left in his cell unattended, without medical attention. Only at midnight was he taken to the hospital for treatment, he received stitches to the head and was discharged. Even after the event, and investigations into the actions of some warders, the author contends that he continued to be subjected to constant verbal intimidation and abuse. On 16 June 1990, the Jamaica Council for Human Rights wrote to London counsel, noting that the author was "badly battered as a result of the disturbances in the prison at the end of last month", and submitted a complaint before the Jamaican authorities on the author's behalf.

3.4 It is submitted that the treatment to which the author was subjected on 28 May 1990, and the inadequate medical treatment he subsequently received, as well as the continuing fear of reprisals by warders, amount to a violation of articles 7 and 10, of the Covenant. Furthermore, the above is said to be in breach of articles 21, 30 and 32 of the UN Standard Minimum Rules for the Treatment of Prisoners.

3.5 Counsel claims a violation of articles 7 and 10 on account of the prolonged detention of the author on death row, under harsh conditions, noting that the author was held on death row for well over eight years. Referring to the judgement of the Judicial Committee in Pratt and Morgan v. Attorney-General of Jamaica, it is submitted that the agony resulting from such long awaited death amounts to cruel, inhuman and degrading treatment. As to conditions of detention on death row, counsel invokes the reports of two non-governmental organisations on the matter. The author himself was confined to a tiny cell for twenty-two hours every day, spending most of his waking hours isolated from other men, with nothing to keep him occupied. Much of his time is spent in enforced darkness. To counsel, these factors are sufficient in themselves to justify findings of violations of articles 7 and 10.

3.6 Counsel affirms that the author made reasonable efforts to seek domestic redress for the treatment he was subjected to on death row. By December 1993, the Office of the Director of Public Prosecutions had not confirmed that charges were pending against the warders responsible for the beatings and the death of three inmates in May 1990. For counsel, the domestic complaints' process is wholly inadequate.

The Committee's admissibility decision

4.1 During its sixty-second session the Committee considered the admissibility of the communication.

4.2 The Committee ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

4.3 The present communication was transmitted to the State party in March 1995, with a request to provide information and observations in respect of the admissibility of the author's claims. No information was received from the State party, in spite of a reminder addressed to it in October 1997. The Committee regretted the absence of cooperation on the part of the State party. In the circumstances, due weight was given to the author's allegations, to the extent that they had been sufficiently substantiated for purposes of admissibility.

4.4 As to the allegations under article 14 of the Covenant, the Committee noted that they related to the evaluation of facts and evidence in the case by the trial judge and the jury. The Committee recalled that it was generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence in a particular case, unless it could be ascertained that the evaluation of evidence and the instructions to the jury were clearly arbitrary or otherwise amounted to a denial of justice. The Committee noted that the author's submissions in relation to his claim did not indicate that the trial was manifestly tainted by arbitrariness or amounted to a denial of justice. Accordingly, he had failed to substantiate his claim, for purposes of admissibility, and this part of the communication was inadmissible under article 2 of the Optional Protocol.

4.5 The Committee considered that the author had sufficiently substantiated the remaining claims relating to the circumstances of his pre-trial detention (article 9, paragraphs 2 to 4), to beatings and intimidation he allegedly was subjected to while on death row and to the circumstances of his detention on death row. In the absence of any State party information on the availability of effective remedies which might still be available to the author in respect of these claims, the Committee considered that they warranted consideration on the merits.

States party's merits observations and the counsel's comments

5.1 In a submission dated 3 June 1998, the State party states that the author's allegation concerning articles 7 and 10 are twofold, the first being the assertion that during the disturbances of 28 May 1990 the author was badly beaten by wardens and then denied medial attention for several hours. In this respect, the State party informed the Committee: "that a Coroner's inquest was held in relation to the deaths of the three prisoners who were killed in the 1990 disturbances and that the author gave evidence at the inquest. The results thereof will be obtained and sent to the Committee."

5.2 With regard to the second allegation of violation of article 7 and 10 due to the author's prolonged detention on death row, the State party denies that there has been a breach of the Covenant and refers to the Committee's decision in Pratt and Morgan [4] Therefore a specific period on death row does not constitute a violation of the Covenant. The commutation of the author's death sentence was done in accordance with the requirements of domestic law.

5.3 With regard to the alleged breach of article 9, paragraphs 2, 3 and 4, due to the author having been detained for four days before being informed of the charges against him, the State party denies this, since it claims that according to its investigations the author was made aware of the nature of the charges against him at the time of his arrest. The formal charge of murder may have been laid at a later stage, however this was not detrimental to the application or constituted a violation of the author's rights.

5.4 In a further submission dated 24 August 1999 the State party, informs the Committee that with regard to the alleged beating of the author by warders on 28 May 1990, when the author was interviewed by the Ministry he could not recall the names of the warders who were involved in the beatings incident. He said he could only recall that one of the warders was called "Big Six". On enquiry it was ascertained that "Big Six" no longer works with the prison. Furthermore the Superintendent at the time (nine years ago) has since retired. In the absence of names the Ministry was unable to conduct a meaningful investigation.

5.5 In the same submission the State party contends that the author during his interview with the Ministry, admitted that he was the main architect behind the riots of 1990 and that on reflection if the warders had not used force to subdue the inmates, the result would have been far worse.

5.6 The State party also contends that the author was not denied medical treatment in 1990, as he alleged in his petition. He was seen on several different occasions by the Prison medical officer and received medical attention from the Spanish Town Hospital and Health Clinic. The State party consequently denies that there has been any breach of article 7 and 10 in respect to medical treatment.

5.7 With respect to the allegations of violation of the Covenant due to the conditions of detention while on death row including counsel's allegation that the author spent 22 hours in enforced darkness etc (see para 3.5 supra) the State party refers to the Committee's jurisprudence[5] to deny any violation of the Covenant.

6.1 By submission dated 4 November 1998, counsel states that the State party has in no way negated the author's allegation that he was subjected to ill-treatment on 28 May 1990 and was subsequently denied adequate treatment, and that he continually feared reprisals from the wardens. Counsel contends that the State party has failed to provide any evidence to rebut the author's allegations as contained in the compliant of 15 February 1995, and consequently maintains that a violation of articles 7 and 10 of the Covenant has occurred.

6.2 With regard to the allegation of a violation of articles 7 and 10 of the Covenant since the author has been held on death row for over eight years, counsel contends that the State party has

not appreciated the Committee's jurisprudence when stating that a specific period on death row does not constitute a violation of the Covenant. He submits that a period of detention on death row in excess of eight years can amount to a violation of articles 7 and 10 paragraph 1, if the author can show further compelling circumstances, reference is made to communication number 588/1994 para 8.1. Counsel respectfully reminds the Committee that during his detention on death row the author, was confined to a tiny cell for 22 hours everyday, most of his waking hours isolated from other men with nothing whatsoever to keep him occupied. To add to his humiliation and the insult to his dignity as a human being, the author spent most of his time in enforced darkness. Counsel contends that the State party has not denied the continued presence of these factors during the author's incarceration on death row and merely asserted that prolonged judicial proceedings do not per se constitute cruel, inhuman or degrading treatment.

6.3 With regard to the State party's challenge of a violation of article 9, paragraphs 2, 3 and 4, in that the author was not promptly informed of the charges against him counsel reiterates that the author was not aware at the time of his arrest of the charges against him. He claims that the State party has failed to provide any particulars as to the nature of the investigations conducted nor has it disclosed either to the Committee or to the author the results of the investigation. Counsel maintains that the author was held in custody for four days incommunicado before being told that he was being charged for murder. He contends that the State party does not deny the allegations but merely says that it was not to the detriment of the author as he was aware of the nature of the charges against him at the time of his arrest. Counsel further contends that no compelling evidence was called at trial or has subsequently been provided by the State party to explain the delay of four days between the author's detention and the investigating officer managing to speak to him. Counsel reiterates that such a delay constitutes a violation of the Covenant.

Examination of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

7.2 With regard to the author's complaints of ill-treatment while in detention at St. Catherine's District Prison, the Committee notes that the author has made very precise allegations, relating to the incidents where he was beaten (paragraph 3.3 supra). The Committee notes the State party's information, that an enquiry had taken place to investigate the 1990 disturbances in which three prisoners had died, and that the author gave evidence at that enquiry. It also notes the information provided in the further submission whereby the State party contended that at the interview with the author, carried out by the Ministry, he had been unable to provide sufficient information on the names of the persons who had beaten him and those names that he had provided were of persons who either no longer worked in the prison or had retired. The State party, consequently, considered that no meaningful investigation could be carried out. The Committee considers that the fact that the perpetrators no longer work in the prison, in no way absolves the State party from its obligations to ensure the enjoyment of Covenant rights. The Committee notes that no investigation was undertaken by the State party in 1990 after the Jamaica Council for Human Rights had submitted a complaint, to the

authorities on the author's behalf. In the absence of any refutation by the State party due weight should be given to the author's allegations. In these circumstances the author's right not to be subjected to degrading treatment but to be treated with humanity and with respect for the inherent dignity of the human person, were not respected in violation of articles 7 and 10, paragraph 1.

7.3 With regard to the conditions of detention on death row at St. Catherine's District Prison, the Committee notes that the author has made specific allegations, about the deplorable conditions of his detention. He claims that he is confined to a 2 metre square cell for 22 hours each day, and remains isolated from other men for most of the day. He spends most of his waking hours in enforced darkness and has little to keep him occupied. He is not permitted to work or to undertake education. The State party has not refuted these specific allegations. In these circumstances, the Committee finds that confining the author under such circumstances constitutes a violation of article 10, paragraph 1, of the Covenant.

7.4 The author has claimed a violation of article 9, paragraph 3, of the Covenant since there was a delay of 4 days between the time of his arrest and the time when he was brought before a judicial authority. The committee notes that the State party has not addressed this issue specifically but has simply pointed out in general terms that the author was aware of the reasons for his arrest. The Committee reiterates its position that the delay between the arrest of an accused and the time before he is brought before a judicial authority should not exceed a few days. In the absence of a justification for a delay of four days before bringing the author to a judicial authority the Committee finds that this delay constitutes a violation of article 9, paragraph 3, of the Covenant.

7.5 The author also has claimed a violation of article 9, paragraphs 2 and 4, since he was not promptly informed of the charges against him at the time of his arrest. Article 9, paragraph 2, of the Covenant gives the right to everyone arrested to know the reasons for his arrest and to be promptly informed of the charges against him. Counsel contends that the author was not informed of the charges against him until four days after his arrest. The Committee notes the State party's contention that the author was aware of the reasons for his arrest in general terms even if the formal charges for murder were only laid against him four days after his arrest. It also notes information provided by counsel where in an affidavit signed by the author on 4 May 1988, he states he was arrested and charged with murder on 1 September 1985. Furthermore, the Committee notes that this issue was not brought to the attention of the Courts in Jamaica. On the basis of the information before it the Committee concludes that the author was aware of the reasons for his arrest and consequently there has been no violation of the Covenant in this respect. The Committee has not found any facts that substantiate a violation of article 9, paragraph 4.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 7, 10, paragraph 1, and 9 paragraph 3, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Freemantle with an appropriate and effective remedy. The State party is under an obligation to ensure that similar violations do not occur in the future.

10. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals with its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] General Comment 13 [21] (article 14), paragraph 7.

[2] General Comment 8 [16] (article 9); CCPR/C/21/Rev.1, page 7; see paras. 2 and 3, where the Committee noted that delays under article 9, paragraph 3, must not exceed a few days.

[3] Communications Nos. 257/1987 (Kelly v. Jamaica), 277/1988 (Jijon v. Ecuador), and 336/1988 (Andre Fillastre v. Bolivia).

[4] See communication No. 210/1986 and 225/1987, paragraph 13.6, it was said "... In principle prolonged judicial proceedings do not per se constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for convicted prisoner".

[5] See communication No. 619/1995 (F. Diedrick v. Jamaica).

APPENDIX

Individual opinion by member Eckart Klein

I think the Committee should have expressly spelled out that the author is entitled, apart from other possible appropriate remedies, to compensation according to article 9, paragraph 5, of the Covenant. A person like the author who has been arrested, but not promptly brought before a judge according to article 9, paragraph, 3 of the Covenant (see paragraph 7.4 of the present Views), is unlawfully detained. His right to compensation is therefore a consequence of the violation of his right under article 9.

(Signed) Eckart Klein

[Done in English, French and Spanish, the English text being the original version. Subsequently issued in Arabic, Chinese and Russian as part of the present report.]

B. Communication No. 631/1995, Spakmo v. Norway
(Views adopted on 5 November 1999, sixty-seventh session)*

Submitted by:	Aage Spakmo (initially represented by Mr. Gustav Hogtun)
Alleged victim:	The author
State party:	Norway
Date of communication:	28 November 1994 (initial submission)
Date of admissibility decision:	20 March 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 5 November 1999,

Having concluded its consideration of communication No. 631/1995 submitted to the Human Rights Committee by Mr. Aage Spakmo under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 28 November 1994, is Aage Spakmo, a Norwegian citizen, born on 21 October 1921. He claims to be the victim of violations by Norway of article 9 of the International Covenant on Civil and Political Rights.**

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden. The text of one individual opinion signed by six members is appended to this document.

** Mr. Spakmo was represented by Mr. Gustav Hogtun until June 1999.

2. At its fifty-ninth session, the Human Rights Committee considered the admissibility of the communication and found that all domestic remedies had been exhausted and that the same matter was not being examined under another procedure of international investigation or settlement. It considered that the author had sufficiently substantiated, for purposes of admissibility, that he had been arbitrarily detained. Accordingly, on 20 March 1997, the Committee decided that the communication was admissible.

The facts

2.1 The author was commissioned, in July 1984, by a landlord, one Finn Grimsgaard, to carry out repairs on a building, including the demolition and replacement of three balconies. Work commenced on 23 July 1984. Two tenants applied for an injunction from the Tenancy Disputes Court until such time as the owner guaranteed that the balconies would be restored to their original appearance; the injunction was granted on 25 July 1984. According to the author, he then contacted the judge of the Tenancy Disputes Court to ascertain how to proceed and was informed that the owner could either request an oral negotiation in court or that the municipal building authorities issue a ruling authorizing the demolition of the balconies. In the morning of Friday 27 July 1984, a municipal inspector, Per M. Berglie (since deceased), examined the building together with the author. The author states that the building inspector gave an oral order to continue with the demolition.

2.2 The author reinitiated the work later on 27 July 1984. After having received a complaint from one of the tenants in the building, the police arrived at the site for inspection at 10.30 p.m. The police was of the opinion that the work was disturbing the peace in the neighbourhood, and verbally ordered the author to stop his work. The author refused to do so and claimed that he was working legally. After repeatedly having been ordered to stop his activities, the superintendent on duty ordered the author's arrest. He was arrested around 11.00 p.m., and released one hour later.

2.3 The next day, the author continued with his demolition activities. Again, the police ordered him to stop, which the author refused. Around 2.25 pm he was arrested and brought to the police station from where he was released eight hours later. On Tuesday 31 July 1984, the building authorities issued a written demolition order for the balconies.

2.4 On 23 September 1986, the author instituted proceedings before the Oslo City Court (Oslo Byrett) claiming damages and compensation for non-pecuniary damages on the grounds that the arrests of 27 and 28 July 1984 had been unlawful. The hearing took place on 1 September 1989; the Court dismissed the author's claim on 4 October 1989. On 15 December 1989 the author appealed the judgement to the Eidsivating High Court. The appeal was heard on 7 October 1992; judgement was pronounced on 20 October 1992. On 23 December 1992, the author appealed to the Supreme Court. On 14 January 1993 the Interlocutory Committee of the Supreme Court decided not to allow the appeal as it had no prospect of succeeding. On 22 June 1994, the author requested the Supreme Court to reopen his case; the petition was rejected on 2 September 1994.

The complaint

3. The author claims to be a victim of a violation of article 9, paragraph 1, of the Covenant in that he was arbitrarily arrested, since his arrest was not on such grounds and in accordance with such procedures as established by law. In this respect, counsel alleges that the police exceeded their competence in that they enforced a temporary order between two parties in a civil suit, acting on information received by a high-ranking officer from a friend who was one of the parties in the civil suit. The author was not party to that suit and could therefore only be detained if so ordered by a judicial authority. Norwegian law provides for a special authority (namsmenn, the head of which in Oslo is the byfogd) to implement civil decisions; the police may only intervene at the request of the mentioned authority. Counsel states that the police and later the Government shifted the burden of proof in demanding that the author prove in writing that he had been authorized to carry out the work at the time when he was arrested. This, counsel contends, is in breach of Norwegian law, as it was the police who had to prove that they had the legal right to act against the author in the manner they did, interfering with his liberty. Furthermore, his arrest was not on such grounds or in accordance with such procedures as established by law, since it was based on the decision of the Tenancy Disputes Court, between the two tenants and the landlord; counsel contends that the decision is not applicable to a third party.

State party's observations

4.1 The State party refers to the procedure before the local courts, during which the courts found that there was no evidence that an oral order was given to the author by the building authorities to continue the demolition of the balconies. Consequently, at the material time the injunction given by the Tenancy Disputes Court prohibiting further demolition of the balconies was operative. Section 343 of the Penal Code makes it a criminal offence to act or to be accessory to an act against a legally imposed prohibition. The author should thus have respected the injunction, and his failing to do so constituted a criminal offence. Moreover, it appears from the police reports that the author was ordered on several occasions to stop the demolition. Because of his failure to comply, he was arrested. The records of the arrest show that the author was arrested for violating section 3 of the police bylaws in conjunction with section 339 (2) of the Penal Code.[1]

4.2 As to counsel's argument that the police had no competence to arrest the author, because it concerned a civil dispute, the State party explains that the police was acting under the Criminal Procedure Act,[2] since the author did not stop committing criminal acts when ordered. The law on the legal enforcement of decisions in civil cases is thus not relevant in the present case. As to counsel's argument that the author was arrested because a high ranking police officer acted on information received from a friend who was a party in the civil suit, the State party refers to the records of the court hearing, which show that the police officer in question was no friend of any of the parties in the civil suit, but that he indeed remembered to have received a communication from one of the parties. He did not remember whether he had acted on the basis of the information received, but did not exclude the possibility. According to the State party, there is nothing improper or unlawful about the police acting upon information received from the public.

The State party concludes that the author's arrest was lawful under Norwegian law. It notes that the author, when bringing his case to the courts, never challenged the lawfulness of his detention other than by arguing that he had received an oral order to continue the work. The Courts held that the police acted lawfully.

4.3 In the State party's opinion, the author's detention was also necessary. It notes that the first detention lasted for one hour and the second for eight hours and argues that this cannot be deemed disproportionate. In this connection, the State party refers to the circumstances of the author's arrest, which show that the author refused to cooperate with the police and continued his demolition work even when ordered repeatedly to stop it.

4.4 The State party concludes that no violation of article 9 has occurred.

Counsel's comments

5.1 In his comments on the State party's submission, counsel recalls that the injunction in favour of the tenants of the building was cancelled the Tuesday following the author's arrest. In the circumstances, the author who claimed to have received an oral order by the building authorities to proceed with the demolition, should not have been arrested by the police. In this connection, counsel submits that the author had been informed by the judge of the Tenancy Dispute Court that an order by the building authorities would overrule the injunction. The author then contacted a police officer on Friday morning and informed her that he had oral permission from the building inspector to continue the demolition of the balconies. The police failed to verify this information and instead went on to arrest the author. Counsel maintains that the police's actions were in violation of the regulations governing the police since the author's activities did not constitute a serious disturbance of public order or great danger for the public. According to counsel, the author acted out of a social and moral duty, in order to avoid danger for the public. His arrest cannot be said to have been necessary.

5.2 Moreover, counsel reiterates that it is not for the police to get involved in a civil dispute, unless specifically called for by the relevant authorities, which was not so in the present case. He suggests that one of the reasons why the police immediately acted following a telephone call from one of the tenants was that the author had had problems with the police in the past. Counsel further states that article 343 of the Penal Code requires that the accused has acted with intent - and argues that there was never any intent on the part of the author to commit a criminal act. He argues that the fact that the police never brought a case against the author for violating article 343 shows that they knew he was not guilty.

Issues and proceedings before the Committee

6.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

6.2 The question before the Committee is whether the author's arrest was in violation of article 9 of the Covenant. The author has argued that there was no legal basis for his arrest and that the police was exceeding its competence when detaining him. The Committee has noted the State party's explanations in this respect and has examined the Courts' decisions. On the basis of the information before it, the Committee concludes that the author was arrested in accordance with Norwegian law and that his arrest was thus not unlawful.

6.3 The Committee recalls that for an arrest to be in compliance with article 9, paragraph 1, it must not only be lawful, but also reasonable and necessary in all the circumstances.[3] In the instant case, it is not disputed that on Friday 27 July 1984, the police ordered the author several times to stop the demolition, that the hour was 10.30 pm and that the author refused to comply. In the circumstances, the Committee considers that the author's arrest on Friday 27 July 1984 was reasonable and necessary in order to stop the demolition, which the police considered unlawful and a disturbance of the peace in the neighbourhood. The author's arrest of the next day was again a result of him refusing to follow the orders of the police. While accepting that the author's arrest by the police also on Saturday may have been reasonable and necessary, the Committee considers that the State party has failed to show why it was necessary to detain the author for eight hours in order to make him stop his activities. In the circumstances, the Committee finds that the author's detention for eight hours was unreasonable and constituted a violation of article 9, paragraph 1, of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 9, paragraph 1, of the International Covenant on Civil and Political Rights.

8. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Spakmo with an effective remedy, including compensation. The State party is under an obligation to take measures to prevent similar violations in the future.

9. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Section 3 of the police bylaws of Oslo reads: "All persons are obliged to comply immediately with any order, sign or signal given by the police in order to maintain public order, regulate passage or ensure safety and otherwise to enforce the provision of these bylaws." Section 39 of the bylaws reads: "Any violation of these bylaws or any order issued pursuant thereto is punishable in accordance with section 339 (2) of the Penal Code unless a more stringent penal provision is available." Section 339 (2) of the Penal Code reads: "Anyone shall be liable to fines who ... (2) contravenes any regulation issued by a public authority according to law and implying liability to a penalty."

[2] Section 229 of the Criminal procedure Act reads: "Regardless of the severity of the penalty, any person who is with just cause suspected of any offence may be arrested if he: (1) is caught in the act and does not desist from the punishable activity. (2) ..... The provision of section 228 (2) shall apply accordingly." Section 228 (2) reads: "An arrest shall not be made if, considering the nature of the case and other circumstances this would constitute a disproportionate measure."

[3] See the Committee's Views in respect to communication No. 305/1988 (Van Alphen v. The Netherlands), adopted on 23 July 1990.

APPENDIX

Individual opinion (dissenting) signed by members A. Amor, N. Ando, Lord Colville, E. Klein, R. Wieruszewski and M. Yalden

We are unable to agree to the Committee's conclusion that the author's detention for eight hours in the present case was unreasonable and constituted a violation of article 9, paragraph 1, of the Covenant (paragraph 6.3).

The information before the Committee reveals that the author reinitiated the demolition work of the building's balcony late on Friday, 27 July 1984; that the police received a complaint from a tenant in the building; that the police arrived there at 10:30 p.m. and ordered the author to stop; and that upon the author's refusal to obey the order the police arrested him and detained him for one hour (paragraph 2.2). The information also reveals that the next day, Saturday, the author continued his demolition work; that again the police ordered him to stop; and that upon his refusal the police arrested him around 2:25 p.m. and released him "eight hours" later (paragraph 4.2).

Subsequently, the author instituted court proceedings, claiming unlawfulness of the arrest, and went all the way through to the Supreme Court, but the Norwegian courts held that the police acted lawfully (paragraphs 2.4 and 4.2). According to the State party, the author never challenged the lawfulness of the detention in the proceedings. The State party also argues that, considering the circumstances of the case, his detention for eight hours "cannot be deemed disproportionate" (paragraphs 4.2 and 4.3).

We would like to emphasize that the role of the Human Rights Committee is to apply provisions of the Covenant to particular cases and that it is not a fourth instance of any judicial proceedings. According to the established jurisprudence of the Committee, it is not for the Committee but for national courts to evaluate facts and evidence. In fact, the Committee has seldom rejected the national courts' findings or interpretation or application of domestic law if it is, as such, in conformity with the Covenant, unless the interpretation or application is manifestly unreasonable or disproportionate or constitutes denial of justice.

In our opinion the Norwegian courts' decisions in the present case do not disclose any such defect. On the contrary, the courts have taken all the relevant factors into account in reaching their decisions. After his arrest on the Friday night the author was released one hour later around midnight. After his arrest on the Saturday afternoon he was released eight hours later again around midnight. It may be that the police, on the Saturday, had little choice but to hold the author until after nightfall (given the length of daylight hours in Norway in July and the author's previous conduct), they could thus have prevented another disturbance to the peace of the neighbourhood.

For these reasons we are unable to accept the Committee's conclusion in the present case.

(Signed) A. Amor

(Signed) N. Ando

(Signed) Lord Colville

(Signed) E. Klein

(Signed) R. Wieruszewski

(Signed) M. Yalden

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

C. Communication No. 666/1995, Foin v. France
(Views adopted on 3 November 1999, sixty-seventh session)*

Submitted by:	Frédéric Foin (represented by François Roux, lawyer in France)
Alleged victim:	The author
State party:	France
Date of communication:	20 July 1995 (initial submission)
Date of admissibility decision:	11 July 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1999,

Having concluded its consideration of communication No. 666/1995 submitted to the Human Rights Committee by Mr. Frédéric Foin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Frédéric Foin, a French citizen born in September 1966 and living in Valence, France. He claims to be a victim of violations by France of articles 18, 19 and 26, juncto article 8, of the International Covenant on Civil and Political Rights. The author is represented by Mr. François Roux of Roux, Lang-Cheymol, Canizares, a law firm in Montpellier.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden. Pursuant to rule 85 of the Committee's rules of procedure Ms. Christine Chanet did not participate in the examination of the case. The text of one individual opinion signed by three members is appended to this document.

The facts as submitted by the author

2.1 The author, a recognized conscientious objector to military service, was assigned to civilian service duty in the national nature reserve of Camargue in December 1988. On 23 December 1989, after exactly one year of civilian service, he left his duty station; he invoked the allegedly discriminatory character of article 116, paragraph 6, of the National Service Code (Code du service national), pursuant to which recognized conscientious objectors were required to perform civilian national service duties for a period of two years, whereas military service did not exceed one year.

2.2 As a result of his action, Mr. Foin was charged with desertion in peacetime before the Criminal Court (Tribunal Correctionel) of Marseille, under articles 398 and 399 of the Code of Military Justice. The challenge to his conviction in a default judgement pronounced on 12 October 1990 led to a new hearing on 20 March 1992 before the Court, which gave him an eight month suspended prison sentence and ordered the withdrawal of his conscientious objector status (art. 116 (4) of the National Service Code). The Court rejected the author's arguments based in particular on articles 4 (3) (b), 9, 10 and 14 of the European Convention on Human Rights.

2.3 The Court's decision was appealed both by the State Prosecutor (Procureur de la République) and by the author. By a judgement of 18 December 1992, the Court of Appeal of Aix-en-Provence quashed the judgement of 20 March 1992 for misdirection. Notwithstanding, and deciding on the merits of the case, the Court of Appeal found Mr. Foin guilty of the offence of desertion in peacetime and gave him a six month suspended prison sentence.

2.4 On 14 December 1994, the Court of Cassation rejected the author's further appeal. The Court held that the relevant provisions of the European Convention on Human Rights and of the International Covenant on Civil and Political Rights did not prohibit measures requiring conscientious objectors to perform a longer period of national service than persons performing military service, provided the enjoyment or exercise of their fundamental rights and freedoms was not affected.

The complaint

3.1 According to the author, article 116 (6) of the National Service Code (in its version of July 1983 prescribing a period of 24 months for civilian service) violates articles 18, 19 and 26, juncto article 8, of the Covenant in that it doubles the duration of alternative services for conscientious objectors in comparison with military service.

3.2 While acknowledging the Committee's views on communication No. 295/1988,[1] where it had been held, in a similar case, that an extended length of alternative service in comparison with military service was neither unreasonable nor punitive, and where no violation of the Covenant had been found, the author refers to the individual opinions appended to those views by three Committee members, who had concluded that the legislation under challenge was not based on reasonable or objective criteria, such as a more severe type of service or the need for special training in order to perform the longer service. The author endorses the conclusions of those individual opinions.

3.3 The author notes that under articles L.116 (2) to L.116 (4) of the National Service Code, each application for recognition as a conscientious objector has to be approved by the Minister for the Armed Forces. If he rejects the application, an appeal to the Administrative Tribunal is possible under article L.116 (3). In such circumstances, the author argues, it cannot be assumed that the length of civilian service was fixed for reasons of administrative convenience, since anyone accepting to perform civilian service twice as long as military service should be deemed to have genuine convictions. Rather, the length of civilian service must be deemed to have punitive elements, which are not based on any reasonable or objective criterion.

3.4 In support of his contention, the author invokes a judgement of the Italian Constitutional Court of July 1989, which held that civilian service lasting eight months longer than military service was incompatible with the Italian Constitution. He further points to a resolution adopted by the European Parliament in 1967 in which, on the basis of article 9 of the European Convention on Human Rights, it has been suggested that the duration of alternative service should not exceed that of military service. Moreover, the Committee of Ministers of the Council of Europe has declared that alternative service must not be of a punitive nature and that its duration, in relation to military service, must remain within reasonable limits (Recommendation No. R(87)8 of 9 April 1987). Finally, the author notes that the United Nations Commission on Human Rights has declared, in a resolution adopted on 5 March 1987,[2] that conscientious objection to military service constituted a legitimate exercise of the right to freedom of thought, conscience and religion, as recognized by the Covenant.

3.5 In any event, according to the author, the requirement to perform civilian service that is twice as long as military service constitutes prohibited discrimination on the basis of opinion, and the possibility of imprisonment for refusal to perform civilian service beyond the length of time of military service violates articles 18, paragraph 2, 19, paragraph 1, and 26 of the Covenant.

The State party's observations on admissibility and the author's comments thereon

4.1 The State party contends firstly that the communication is incompatible ratione materiae with the provisions of the Covenant since, on the one hand, the Committee has acknowledged in its decision on communication No. 185/1984 (L.T.K. v. Finland)[3] that "the Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of article 8, can be construed as to imply that right" and since, on the other hand, by virtue of article 8, paragraph 3 (c) (ii) of the Covenant, the internal regulation of national service, and therefore of conscientious objector status for those States which recognize it, does not fall within the scope of the Covenant and remains a matter for domestic legislation.

4.2 Subsidiarily, the State party contends that the author does not qualify as a victim. With regard to articles 18 and 19 of the Covenant, the State party claims that by recognizing conscientious objector status and offering conscripts a choice as to the form of their national service, it allows them to opt freely for the national service appropriate to their beliefs, thus enabling them to exercise their rights under articles 18 and 19 of the Covenant. In this connection, the State party concludes, referring to the decision on communication No. 185/1984

cited above, that as the author was not prosecuted and sentenced because of his beliefs or opinions as such, but because he deserted his assigned service, he cannot therefore claim to be a victim of a violation of articles 18 and 19 of the Covenant.

4.3 With regard to the alleged violation of article 26 of the Covenant, the State party, noting that the author complains of a violation of this article because the length of alternative civilian service is double that of military service, submits first of all that "the Covenant, while prohibiting discrimination and guaranteeing equal protection of the law to everyone, does not prohibit all differences of treatment", which must be "based on reasonable and objective criteria".[4] The State party stresses that the situation of conscripts performing alternative civilian service differs from that of those performing military service, notably in respect of the heavier constraints of service in the army. The State party quotes the Committee's views on communication No. 295/1988 (Jarvinen v. Finland), where the Committee held that the 16 month period of alternative service imposed for conscientious objectors - double the 8-month period of military service - was "neither unreasonable nor punitive". The State party therefore concludes that the difference of treatment complained of by the author is based on the principle of equality, which requires different treatment of different situations.

4.4 For all of these reasons, the State party requests the Committee to declare the communication inadmissible.

5.1 Concerning the State party's first argument as to the Committee's competence ratione materiae, the author cites the Committee's General Comment on article 18, where it is stated that the right to conscientious objection "can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service".[5] According to the author, it is clear from these comments that the Committee is competent to determine whether or not there has been a violation of the right to conscientious objection under article 18 of the Covenant.

5.2 Concerning the alleged violation of article 26, the author claims that requiring a period of alternative civilian service twice the length of military service constitutes a difference of treatment which is not based on "reasonable and objective criteria" and therefore constitutes discrimination prohibited by the Covenant (communication No. 196/1985 cited above). In support of this conclusion, the author argues that there is no justification for making alternative civilian service twice the length of military service; in fact, unlike in the Jarvinen case (communication No. 295/1988 cited above), the longer duration is not justified by any relaxation of the administrative procedures for obtaining conscientious objector status since, under articles L.116 (2) and L.116 (4) of the National Service Code, applications for conscientious objector status are subject to approval by the Minister for the Armed Forces. Nor is it justified in the general interest. Furthermore, conscientious objectors derive no benefit or privilege from their status - unlike, for example, persons assigned to perform international cooperation services instead of military service, who have the opportunity to work abroad in a professional field

corresponding to their university qualifications for 16 months (i.e. four months less than the civilian service for conscientious objectors) - and a difference of treatment is not, therefore, justified on that ground.

The Committee's admissibility decision

6.1 At its sixtieth session, the Committee considered the admissibility of the communication.

6.2 The Committee took note of the State party's arguments concerning the incompatibility of the communication ratione materiae with the provisions of the Covenant. In this regard, the Committee considered that the matter raised in the communication did not concern a violation of the right to conscientious objection as such. The Committee considered that the author had sufficiently demonstrated, for the purposes of admissibility, that the communication might raise issues under provisions of the Covenant.

7. Accordingly, on 11 July 1997 the Committee decided that the communication was admissible.

State party's observations on the merits of the communication

8.1 By submission of 8 June 1998, the State party argues that the communication should be rejected because the author has failed to show that he is a victim, and because his complaints are ill-founded.

8.2 According to the State party, article L.116 of the National Service Code in its version of July 1983 instituted a genuine right to conscientious objection, in the sense that the sincerity of the objections is said to be shown by the request alone, if presented in accordance with the legal requirements (that is, motivated by an affirmation of the applicant that he has personal objections to using weapons). No verification of the objections took place. To be admissible, requests had to be presented on the 15th of the month preceding the incorporation into the military service. Thus a request could only be rejected if it was not motivated or if it was not presented in time. A right to appeal existed to the administrative tribunal.

8.3 Although the normal length of military service since January 1992 in France was 10 months, some forms of national service lasted 12 months (military service of scientists) and 16 months (civil service of technical assistance). The length of the service for conscientious objectors was 20 months. The State party denies that the length has a punitive or discriminatory character. It is said to be the only way to verify the seriousness of the objections, since the objections were no longer tested by the administration. After having fulfilled their service, conscientious objectors have the same rights as those who have finished civil national service.

8.4 The State party informs the Committee that on 28 October 1997 a law was adopted to reform the national service. Under this law, all young men and women will have to participate between their 16th and 18th birthday in a one day call-up to prepare for defence. Optional voluntary service can be done for a duration of 12 months, renewable up to 60 months. The new law is applicable to men born after 31 December 1978 and women born after 31 December 1982.

8.5 According to the State party, its system of conscientious objection as applied to the author, was in accordance with the requirements of articles 18, 19 and 26 of the Covenant, and with the Committee's general comment No. 22. The State party submits that its regime for conscientious objection did not make any difference on the basis of belief, and no process of verification of the motivation of applicants occurred, such as takes place in many neighbouring countries. No discrimination existed against conscientious objectors, as their service was a recognised form of the national service, on equal footing with military service or other forms of civil service. In 1997, just under 50 per cent of those performing civil service were doing this on the basis of conscientious objections to military service.

8.6 The State party submits that the author of the present communication has not at all been discriminated on the basis of his choice to perform national service as a conscientious objector. It notes that the author was convicted for not complying with his obligations under the civil service freely chosen by him and that he never before objected to the duration of the service. His conviction was thus not because of his personal beliefs, nor on the basis of his choice for alternative civil service, but on the basis of his refusal to respect the conditions of that type of service. In this context, the State party notes that it would have been open to the author to choose another form of unarmed national service, such as one of technical assistance. On this basis, the State party argues that the author has not established that he is a victim of a violation by the State party.

8.7 Subsidiarily, the State party argues that the author's claim is ill-founded. In this context, the State party recalls that according to the Committee's own jurisprudence, not all differences in treatment constitute discrimination, as long as they are based on reasonable and objective criteria. In this context, the State party refers to the Committee's Views in case No. 295/1988 (Jarvinen v. Finland), where the service for conscientious objectors was 16 months and that for other conscripts 8 months, but the Committee found that no violation of the Covenant had occurred because the length of the service ensured that those applying for conscientious objector status would be serious, since no further verification of the objections took place. The State party submits that the same reasoning should apply to the present case.

8.8 In this context, the State party also notes that the conditions of the alternative civil service were less onerous than that of military service. The conscientious objectors had a wide choice of posts. They could also propose their own employer and could do their service within their professional interest. They also received a higher payment than those serving in the armed forces. In this context, the State party rejects counsel's claim that the persons performing international cooperation service received privileged treatment vis à vis conscientious objectors, and submits that those performing international cooperation service did so in often very difficult situations in a foreign country, whereas the conscientious objectors performed their service in France.

8.9 The State party concludes that the length of service for the author of the present communication had no discriminatory character compared with other forms of civil service or military service. The differences that existed in the length of the service were reasonable and reflected objective differences between the types of service. Moreover, the State party submits that in most European countries the time of service for conscientious objectors is longer than military service.

Counsel's comments

9.1 In his comments, counsel submits that at issue are the modalities of civil service for conscientious objectors. He submits that the double length of this service was not justified by any reason of public order and refers in this context to paragraph 3 of article 18 of the Covenant which provides that the right to manifest one's religion or beliefs may be subject only to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. He also refers to the Committee's general comment No. 22 where the Committee stated that restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. He argues that the imposition upon conscientious objectors of civil service of double length as that of the military service constitutes a discriminatory restriction, because the manifestation of a conviction such as the refusal to carry arms, does not in itself affect the public safety, order, health, or morals or the fundamental rights and freedoms of others since the law expressly recognizes the right to conscientious objection.

9.2 Counsel states that, contrary to what the State party has submitted, persons who requested status as a conscientious objector were subject to administrative verification and did not have a choice as to the conditions of service. In this context, counsel refers to the legal requirements that a request had to be submitted before the 15th of the month of incorporation into the military service, and that it had to be motivated. Thus, the Minister for the Armed Forces might refuse a request and no automatic right to conscientious objector status existed. According to counsel, it is therefore clear that the motivation of the conscientious objector was being tested.

9.3 Counsel rejects the State party's argument that the author himself had made an informed choice as to the kind of service he was going to perform. Counsel emphasizes that the author made his choice on the basis of his conviction, not on the basis of the length of service. He had no choice in the modalities of the service. Counsel argues that no reasons of public order exist to justify that the length of civil service for conscientious objectors be twice the length of military service.

9.4 Counsel maintains that the length of service constitutes discrimination on the basis of opinion. Referring to the Committee's Views in communication No. 295/1988 (Järvinen v. Finland), counsel submits that the present case is to be distinguished, since in the earlier case the extra length of service was justified, in the opinion of the majority in the Committee, by the absence of administrative formalities in having the status of conscientious objector recognized.

9.5 As far as other forms of civil service are concerned, especially those doing international cooperation service, counsel rejects the State party's argument that these were often performed in difficult conditions and on the contrary, asserts that this service was often fulfilled in another European country and under pleasant conditions. Those performing the service moreover built up a professional experience. According to counsel, the conscientious objector did not draw any benefit from his service. As regards the State party's argument that the extra length of service is a test for the seriousness of a person's objections, counsel argues that to test the seriousness of conscientious objectors constitutes in itself a flagrant discrimination, since those who applied for another form of civil service were not being subjected to a test of their sincerity. With regard to the advantages mentioned by the State party (such as no obligation to wear a uniform, not being

under military discipline), counsel notes that the same advantages were being enjoyed by those performing other kinds of civil service and that these did not exceed 16 months. With regard to the State party's argument that the conscientious objectors received a higher pay than those performing military service, counsel notes that they worked in structures where they were treated as employees and that it was thus normal that they would receive a certain remuneration. He states that the pay was little in comparison with the work done and much less than that received by normal employees. According to counsel, those performing cooperation service were better paid.

Issues and proceedings before the Committee

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

10.2 The Committee has noted the State party's argument that the author is not a victim of any violation, because he was not convicted for his personal beliefs, but for deserting the service freely chosen by him. The Committee notes, however, that during the proceedings before the courts, the author raised the right to equality of treatment between conscientious objectors and military conscripts as a defence justifying his desertion and that the courts' decisions refer to such claim. It also notes that the author contends that, as a conscientious objector to military service, he had no free choice in the service that he had to perform. The Committee therefore considers that the author qualifies as a victim for purposes of the Optional Protocol.

10.3 The issue before the Committee is whether the specific conditions under which alternative service had to be performed by the author constitute a violation of the Covenant. The Committee observes that under article 8 of the Covenant, States parties may require service of a military character and, in case of conscientious objection, alternative national service, provided that such service is not discriminatory. The author has claimed that the requirement, under French law, of a length of 24 months for national alternative service, rather than 12 months for military service, is discriminatory and violates the principle of equality before the law and equal protection of the law set forth in article 26 of the Covenant. The Committee reiterates its position that article 26 does not prohibit all differences of treatment. Any differentiation, as the Committee has had the opportunity to state repeatedly, must however be based on reasonable and objective criteria. In this context, the Committee recognizes that the law and practice may establish differences between military and national alternative service and that such differences may, in a particular case, justify a longer period of service, provided that the differentiation is based on reasonable and objective criteria, such as the nature of the specific service concerned or the need for a special training in order to accomplish that service. In the present case, however, the reasons forwarded by the State party do not refer to such criteria or refer to criteria in general terms without specific reference to the author's case, and are rather based on the argument that doubling the length of service was the only way to test the sincerity of an individual's convictions. In the Committee's view, such argument does not satisfy the requirement that the difference in treatment involved in the present case was based on reasonable and objective criteria. In the circumstances, the Committee finds that a violation of article 26 occurred, since the author was discriminated against on the basis of his conviction of conscience.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. The Human Rights Committee notes with satisfaction that the State party has changed the law so that similar violations will no longer occur in the future. In the circumstances of the present case, the Committee considers that the finding of a violation constitutes sufficient remedy for the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Jarvinen v. Finland, Views adopted on 25 July 1990, paras. 6.4 to 6.6.

[2] Document E/CN.4/1987/L.73 of 5 March 1987.

[3] L.T.K. v. Finland, communication declared inadmissible on 9 July 1985.

[4] See the Committee's views on communication No. 196/1985, Gueye v. France. Views adopted on 3 April 1989.

[5] General comment No. 22 (48), adopted at the Committee's forty-eighth session, in July 1993.

APPENDIX

Separate, dissenting, opinion of members Nisuke Ando, Eckart Klein and David Kretzmer

1. We agree with the Committee's approach that article 26 of the Covenant does not prohibit all differences in treatment, but that any differentiation must be based on reasonable and objective criteria. (See, also, the Committee's General Comment No. 18). However, we are unable to agree with the Committee's view that the diferentiation in treatment in the present case between the author and those who were conscripted for military service was not based on such criteria.

2. Article 8 of the Covenant, that prohibits forced and compulsory labour, provides that the prohibition does not include "any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors". It is implicit in this provision that a State party may restrict the exemption from compulsory military service to conscientious objectors. It may refuse to grant such an exemption to all other categories of persons who would prefer not to do military service, whether the reasons are personal, economic or political.

3. As the exemption from military service may be restricted to conscientious objectors, it would also seem obvious that a State party may adopt reasonable mechanisms for distinguishing between those who wish to avoid military service on grounds of conscience, and those who wish to do so for other, unacceptable, reasons. One such mechanism may be establishment of a decision-making body, which examines applications for exemption from military service and decides whether the application for exemption on grounds of conscience is genuine. Such decision-making bodies are highly problematical, as they may involve intrusion into matters of privacy and conscience. It would therefore seem perfectly reasonable for a State party to adopt an alternative mechanism, such as demanding somewhat longer service from those who apply for exemption. (See the Committee's Views in Communication No. 295/1988, Jarvinen v. Finland). The object of such an approach is to reduce the chance that the conscientious objection exemption will be exploited for reasons of convenience. However, even is such an approach is adopted the extra service demanded of conscientious objectors should not be punitive. It should not create a situation in which a real conscientious objector may be forced to forego his or her objection.

4. In the present case the military service was 12 months, while the service demanded of conscientious objectors was 24 months. Had the only reason advanced by the State party for the extra service been the selection mechanism, we would have tended to hold that the extra time was excessive and could be regarded as punitive. However, in order to assess whether the differentiation in treatment between the author and those who served in the military was based on reasonable and objective criteria all the relevant facts have to be taken into account. The Committee has neglected to do this.

5. The State party has argued that the conditions of alternative service differ from the conditions of military service (see paragraph 8.8 of the Committee's Views). While soldiers were assigned to positions without any choice, the conscientious objectors had a wide choice of

posts. They could propose their own employers and could do service within their own professional fields. Furthermore, they received higher remuneration than people servicing in the armed forces. To this should be added that military service, by its very essence, carries with it burdens that are not imposed on those doing alternative service, such as military discipline, day and night, and the risks of being injured or even killed during military manoeuvers or military action. The author has not refuted the arguments relating to the differences between military service and alternative service, but has simply argued that people doing other civil service also enjoyed special conditions. This argument is not relevant in the present case, as the author's service was carried out befoe the system of civil service was instituted.

6. In light of all the circumstances of this case, the argument that the difference of twelve months between military service and the service required of conscientious objectors amounts to discrimination is unconvincing. The differentiation between those serving in the military and conscientious objectors was based on reasonable and objective criteria and does not amount to discrimination. We were therefore unable to join the Committee in finding a violation of article 26 of the Covenant in the present case.

(Signed) N. Ando

(Signed) E. Klein

(Signed) D. Kretzmer

[Done in English, French and Spanish, the English text being the original version. Subsequently to be translated also into Arabic, Chinese and Russian as part of the present report.]

D. Communication No. 682/1996, Westerman v. The Netherlands (Views adopted on 3 November 1999, sixty-seventh session)*

Submitted by	Paul Westerman (represented by E. Th. Hummels, legal counsel)
Alleged victim	The author
State party	The Netherlands
Date of communication	22 November 1995
Date of admissibility decision	16 October 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1999,

Having concluded its consideration of communication No. 682/1996 submitted to the Human Rights Committee on behalf of Paul Westerman, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1 The author of the communication is Paul Westerman, a Dutch citizen, born on 25 January 1961. He claims to be a victim of a violation by the Netherlands of articles 15 and 18 of the Covenant. He is represented by Mr. E. Th. Hummels, legal counsel.

Facts as submitted

2.1 The author states that he has conscientious objections to military service, but that his application to be recognized as a conscientious objector under the Wet Gewetensbezwaarden

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of two dissenting individual opinions, signed by six Committee members is appended to the present document.

Militaire Dienst (Military Service (Conscientious Objections) Act) was refused by the Dutch authorities. The author's appeals against the refusal were dismissed by the Minister of Defence, and subsequently the Raad van State (Council of State). As a result, the author became eligible for military service.

2.2 In the beginning of his military service, on 29 October 1990, the author was told by a military officer to put on a uniform, which he refused. The author stated that he refused any sort of military service because of his conscientious objections. Although the officer reminded him that insubordination is a criminal offence, the author persisted in refusing any military orders.

2.3 On 22 November 1990 the case was considered by the Arrondissementskrijgsraad (military tribunal) of Arnhem on the basis of article 114 of the Wetboek van Militaire Strafrecht (Military Penal Code) which stated that

> "The military who refuses or intentionally fails to obey any official order, or who on his own initiative oversteps such an order, will be punished with a sentence of imprisonment of maximum one year and nine months, for being guilty of intentional disobedience.
>
> "... the maximum of the punishment will be doubled if
>
> 1. the perpetrator intentionally persists in his disobedience, after a superior has pointed out that his behaviour is punishable.
>
> 2. ..."

2.4 On 1 January 1991, new legislation concerning military administration of justice entered into force. The new article 139 of the Military Penal Code states that

> "1. The military who refuses or intentionally fails to perform any duty, of whatever nature, will be punished with a prison sentence of maximum two years or a fine in the fourth category.
>
> "2. ..."

2.5 Upon summons by the Prosecutor and in accordance with the new legislation, the author was then tried for having refused military service in breach of article 139 of the Military Penal Code by the District Court of Arnhem. On 19 March 1991 the District Court of Arnhem declared the case against the author inadmissible, on the grounds that article 139 entered into force only after the refusal to serve by the author, and that there was no equivalent legal provision before that date criminalizing the refusal of all military service.

2.6 On appeal filed by the prosecutor, the Court of Appeal (Gerechtshof) of Arnhem, by judgment of 14 August 1991, found that, at the time of the incident in October 1990, the total refusal of any military service was made a criminal offence by the former article 114 of the Military Penal Code. The Court of Appeal pointed out that the different formulation of the new article 139 of the Military Penal Code was not based on a changed view of the criminality of the conduct in question. The Court of Appeal further stated that the conscientious objections of the

author were no reason for acquittal, noting that his objections had already been considered in the procedures concerning his application for recognition as a conscientious objector and rejected. The Court sentenced the author to nine months of imprisonment.

2.7 The author filed an appeal in cassation to the Hoge Raad (Supreme Court). On 24 November 1992, the Supreme Court confirmed the judgment of the Court of Appeal and rejected the author's appeal in cassation. With this, it is submitted, all domestic remedies have been exhausted.

The complaint

3.1 The author's conviction is said to constitute a violation of articles 15 and 18 of the Covenant. In this context, counsel argues that the Government's note of explanation, when introducing the new article 139 in Parliament, shows that the main purpose of the new article was to criminalize the attitude of the "total objector", not the mere fact of not following an order. Counsel explains that prior to the introduction of the (new) article 139, the fact that someone refused all military service could only be considered in the severity of the sentence, but that with the (new) article 139 the total refusal of military service has become a material element of the offence.

3.2 The author further states that he is of the opinion that the nature of the military is in conflict with the moral destination of man. The failure of the courts to treat the author's conscientious objections against military service as a justification for his refusal to perform military service, and to acquit the author, is said to constitute a violation of article 18 of the Covenant.

The Committee's admissibility decision

4. On 9 May 1996, the State party informed the Committee that it had no objection to the admissibility of the communication.

5. On 16 October 1997, the Committee noted that no obstacles to admissibility existed and considered that the issues raised by the communication should be considered on its merits.

State party's observations

6.1 By submission of 12 May 1998, the State party recalls the facts of the case and cites the conclusions by the Supreme Court when dismissing the author's appeal in cassation:

> "The Appeal Court expressed its opinion that the act at issue -the refusal to wear military uniform as an expression of a general refusal to do military service -was an offence, at the time it was committed, under article 114 of the old Military Criminal Code, just as it is an offence under current law as defined in article 139 of the new Military Criminal Code. It cannot be said that in so doing the Appeal court took an incorrect view of article 1 of the Criminal Code[1] or that its judgement was not furnished with sufficient reasons."

"The statement of grounds for appeal overlooks the obstacle to a defence claiming immunity from criminal liability on grounds of conscientious objections against any form of military service, namely that the procedure for recognition of such objections is fully regulated in the Military Service (Conscientious Objectors) Act."

6.2 The State party argues that there has been no violation of article 15 in the author's case. It observes that the nulla poena principle implies that a person knows in advance that the act he is about to commit is an offence under statute law. The author knew or could have known that refusal to put on a military uniform as expression of a refusal to perform military service was an offence under the Military Criminal Code.

6.3 Secondly, the State party points out that the legislative amendment at issue in this case was not inspired by a changed view as to whether the act in question merited punishment. It recalls that article 114 of the old Military Criminal Code criminalized failure to obey military orders, and that article 139 of the new code criminalizes refusal or deliberate failure to perform any military duty whatsoever. It explains that this amendment formed part of a series of legislative amendments aimed at drawing a sharp distinction between criminal and disciplinary military law. Under the new legislation, the only acts defined as criminal offences are those representing contraventions of the primary purpose of the armed forces. All other contraventions have been brought within the compass of disciplinary law. Accordingly, criminal law is no longer applicable to the simple failure to perform a duty. Total refusal to perform military service, however, continued to be a criminal offence and is now covered by article 139. According to the State party, the new article was thus designed for technical legislative reasons, since the previous catch-all provision had lapsed, and did not create a new offence. Transitional law allowed for the changing of charges drawn up under the old law in order to conform with the new law. The State party observes that the maximum sentence under the new provision is lighter than the one under the old provision.

6.4 With regard to the author's claim under article 18, the State party refers to the Committee's jurisprudence, that the Covenant does not preclude the institution of compulsory military service. Under the Covenant, the question of whether States parties recognise conscientious objections to military service is expressly left to the States themselves. Thus, according to the State party, the requirement to do military service cannot render the author a victim of a violation of article 18.

6.5 With regard to the author's claim that his conscientious objections were not taken into account by the Courts, the State party notes that under Dutch law, those who have conscientious objections to performing military service, may request recognition of these objections under the Military Service (Conscientious Objections) Act. Under the Act, conscientious objections are defined as: "insurmountable objections of conscience to performing military service in person, because of the use of violent means in which one might become involved while serving in the Dutch armed forces". The author's request was denied by the Minister of Defence by decision of 25 January 1989, on the ground that the objection advanced by the author - that he would not be able to take decisions for himself in the armed forces - did not constitute sufficient grounds for recognition under the Act, since it was mainly concerned with the hierarchical structure of the army and not necessarily related to the use of violence. The highest administrative court rejected the author's appeal against the Minister's decision. Since the author's objections against

military service were assessed by the highest administrative court, which found that they did not constitute conscientious objections under the Military Service (Conscientious Objections) Act, they could not be assessed again by the Criminal Courts. The State party argues that no violation of article 18 occurred in the author's case.

Counsel's comments

7.1 On 30 August 1998, counsel informs the Committee that the author has been imprisoned on 8 August 1998, in order to serve the prison sentence which was imposed on him by the judgement of 14 August 1991.

7.2 With regard to the State party's observations, counsel states that on 29 October 1990, the author knew that it was an offence under article 114 of the MCC to refuse to put on a military uniform. However, this article was abolished on 1 January 1991, and the author was tried after 1 January 1991. Counsel reiterates that the aim of introducing the new article 139 was to criminalize the attitude of the total objector, something that had not been punishable before. He therefore maintains that the offence created by article 139 was a new offence and not the same as the offence previously punishable by article 114.

7.3 Counsel further argues that in a country where a regulation for conscientious objections exists, the articles of the Covenant are still applicable. Counsel points out that the fact that the author's objections were not recognised as conscientious objections within the meaning of the Act, does not signify that his objections were not objections of conscience. The failure of the Criminal Courts to take his objections into account and dismiss the case against him, therefore constitutes a violation of article 18 of the Covenant, since the author has been prosecuted for reasons of conscience.

Further State party's submission

8. On 9 September 1998, the State party forwards a copy of a letter by the Minister of Justice to the author, dated 7 September 1998. From the letter, it appears that the author had failed to report after having been called to begin serving his sentence on 16 May 1994, and that he was arrested and detained on 8 August 1998. After his arrest, the author filed an application for clemency and requested his release pending the decision. In the letter, the Minister rejects his immediate release, but states that he will be provisionally released from detention after three months if the decision on clemency has not yet been taken.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes that at the time when the author refused to obey an order and persisted in his refusal to carry out military orders, these acts constituted an offence under the Military Criminal Code, for which he was charged. Subsequently, and before the author was convicted, the Code was amended and the amended Code was applied to the author. Under the

new Code, the author's refusal to obey military orders still constituted a criminal offence. The Committee has noted the author's argument that the nature of the offence in the new Code is different from the one in the old Code, in that it is constituted by total refusal, an attitude, rather than a single refusal of orders. The Committee notes that the acts which constituted the offence under the new Code were that the author refused to perform any military duty. Those acts were an offence at the time they were committed, under the old Code, and were then punishable by 21 months' imprisonment (for a single act) or by 42 months' imprisonment (for repeated acts). The sentence of 9 months imposed on the author was not heavier than that applicable at the time of the offence. Consequently, the Committee finds that the facts of the case do not reveal a violation of article 15 of the Covenant.

9.3 With regard to the author's claim that his conviction was in violation of article 18 of the Covenant, the Committee observes that the right to freedom of conscience does not as such imply the right to refuse all obligations imposed by law, nor does it provide immunity from criminal liability in respect of every such refusal. Nevertheless, the Committee in its General Comment has expressed the view that the right to conscientious objection to military service can be derived from article 18 [General Comment 22, article 18, forty-eighth session, 1993]. In its General Comment on article 18 the Committee considered that "the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief." The Committee notes that under Dutch law, there is a procedure for the recognition of conscientious objections against military service on the ground of insurmountable objection of conscience to military service because of the use of violent means (para. 6.5 above).

9.4 The author sought recognition as a conscientious objector. The Minister of Defence held that his objection that he would not be able to take decisions for himself did not constitute grounds for recognition under Dutch law. In his appeal to the Council of State (dated 13 February 1989) against the failure to recognize him as a conscientious objector, the author stated:

> "Under no condition appellant will obey the legal duty to do military service in the Dutch armed forces, because the nature of the armed forces is contrary to the destination of (wo)man. The armed forces ask namely of their participants to give away the most fundamental and inalienable right that they have as a human being, namely the right to act according to their moral destination or essential being. The 'participator' is forced to give away the right of say and to become an instrument in the hands of other people, an instrument that ultimately is directed to kill a fellow human being when these other people consider such necessary.
>
> "This instrument (or armed forces) can only function well, when the moral capacities or moral intuition of the participators are destructed. Every human being who knows to open himself, to listen to his moral destination will agree that elimination of the armed forces out of our society is of the utmost importance. An importance that transcends the possible consequences of a protest according to the Penal law."

The Administrative Disputes Division of the Council of State declared his appeal unfounded on 12 February 1990.

As a consequence of the rejection of his claim for recognition as a conscientious objector the author's refusal to perform military duty made him liable to be charged with a criminal offence.

9.5 The question for the Committee is whether the imposition of sanctions to enforce the performance of military duty was, in the case of the author, an infringement of his right to freedom of conscience. The Committee observes that the authorities of the State party evaluated the facts and arguments advanced by the author in support of his claim for exemption as a conscientious objector in the light of its legal provisions in regard to conscientious objection and that these legal provisions are compatible with the provisions of article 18.[2] The Committee observes that the author failed to satisfy the authorities of the State party that he had an "insurmountable objection of conscience to military service ... because of the use of violent means" (para. 5). There is nothing in the circumstances of the case which requires the Committee to substitute its own evaluation of this issue for that of the national authorities.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Article 1 of the Criminal Code prohibits the retroactive application of criminal law.

[2] See General Comment 22 (48), paragraph 11 dealing with the right to conscientious objection.

APPENDIX

Individual opinion (dissenting) by Committee members P. Bhagwati, L. Henkin, C. Medina Quiroga, F. Pocar and M. Scheinin

In our opinion the author's reasons for conscientious objection to military service, as reproduced in paragraph 9.4 of the Views of the Committee, show that his objection constituted a legitimate manifestation of his freedom of thought, conscience or religion under article 18 of the Covenant. The State party's arguments presented to justify the denial of conscientious objector status in the author's case, reflected in paragraphs 6.4 and 6.5 of the Views, may suffice to explain why the author's reasons did not constitute conscientious objections under the State party's domestic law. However, we find that the State party has failed to provide justification for its decision to interfere with the author's right under article 18 of the Covenant in the form of denial of conscientious objector's status and imposing a term of imprisonment. As was stated by the Committee in paragraph 11 of its General Comment 22 [48], there should be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs. We find that the author is the victim of a violation of article 18.

(Signed) P. Bhagwati

(Signed) L. Henkin

(Signed) F. Pocar

(Signed) C. Medina Quiroga

(Signed) M. Scheinin

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also into Arabic, Chinese and Russian as part of the present report.]

Individual opinion (dissenting) by Committee member H. Solari Yrigoyen

In my opinion, the Committee's decision should have read as follows:

9.2 The Committee notes that from the moment he first contacted his country's military authorities concerning his military service, the author stated that he was a conscientious objector, and that the relevant authorities - the Minister of Defence and the Council of State - refused to accord him that status and declared him eligible for military service.

At the start of his military service, on 29 October 1990, the author again stated that by virtue of his status as a "total" conscientious objector he was prevented from performing any sort of military service, and refused to put on a uniform when ordered to do so by an officer. In the eyes of the State party the author committed the crimes of insubordination and refusal to perform any type of military service, punishable under article 114 of the Military Penal Code then in force. In the author's view his refusal to perform military service and to obey the order to put on a uniform was the consequence of his being a conscientious objector. The Court of Appeal of Arnhem sentenced the author to nine months' imprisonment, a judgement that was confirmed by the Supreme Court. Those decisions rejected the defence of conscientious objection repeatedly invoked by the author.

The State party's legislation accords limited recognition to conscientious objection to performing military service, when these objections constitute an insurmountable obstacle to performing military service "because of the use of violent means in which one might become involved while serving Y", as stated in paragraph 6.5. Consequently, the status of "total objector" invoked by the author to explain the incompatibility of his objections with military service, its regulations and its orders, could not be squared with the restrictive limits laid down by the Netherlands law, and would be very difficult to establish in times of peace when "violent means" were not used. Nonetheless, even in peacetime, military service is connected with war.

As for the author's contention that his case reveals a violation of article 15 of the Covenant, the Committee notes that the sentence was based on the legislation in force at the time of the acts, and not on the legislation subsequently enacted. Consequently the Committee considers that there has been no violation of article 15.

9.3 The author further argues that the sentence he received involves a violation of article 18 of the Covenant. It is thus for the Committee to decide whether or not that article was violated. The positions of the parties reveal a conflict of values, in which the State's position has prevailed up until now, given the compulsory rather than voluntary nature of military service. Conscientious objection is based on a pluralistic conception of society in which acceptance rather than coercion is the decisive factor.

The Committee considers that conscientious objection to performing military service is a clear manifestation of the freedom of thought, conscience and religion recognized by article 18 of the Universal Declaration of Human Rights, protected by article 18 of the International Covenant on Civil and Political Rights, and supported by a growing tendency for legislation to accept this fundamental right, without prejudice to provision, in cases such as the present one, for alternative service whose nature is such as to recognize equality before the law. One

example of this tendency is Commission on Human Rights draft resolution E/CN.4/1998/L.93, concerning conscientious objection to military service, sponsored by the State party and 11 other European States.

10. In view of the fact that the sentence imposed on the author was a direct consequence of the rejection of conscientious objection repeatedly invoked by the author, the Committee is of the opinion that article 18 of the Covenant has been violated in the present case.

The above is my dissenting opinion.

(Signed) Hipólito Solari Yrigoyen

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

E. Communication No. 688/1996, Carolina Teillier Arredondo v. Peru (Views adopted on 27 July 2000, sixty-ninth session)*

Submitted by:	Ms. Carolina Teillier Arredondo
Alleged victim:	Maria Sybila Arredondo
State party:	Peru
Date of communication:	17 November 1995 (initial submission)
Prior decisions:	Special Rapporteur's rule 91 decision, transmitted to the State party on 16 April 1996 (not issued in document form) CCPR/C/64/D/688/1996 - Decision on admissibility adopted on 23 October 1998
Date of present decision:	27 July 2000

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 October 1998,

Having concluded its consideration of communication No. 688/1996 submitted to the Human Rights Committee by Ms. Carolina Teillier Arredondo, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, her counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Ms. Carolina Teillier Arredondo, daughter of Ms. Maria Sybila Arredondo, who is a Chilean national and Peruvian citizen by marriage, a widow, and currently imprisoned at the High-Security Prison for Women in Chorrillos, Lima (Peru), where she is serving several sentences for terrorist activities. The author is submitting the communication on behalf of her mother, who for technical reasons is unable to do so herself.

* The following members of the Committee participated in the examination of the case: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. P.N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Abdallah Zakhia.

She claims that her mother is the victim of violations by Peru of the International Covenant on Civil and Political Rights, more specifically of articles 7, 9, paragraphs 3 and 4, 10, paragraphs 1 and 3, and 14, paragraphs 1, 2, 3 (b), (c), (d) and (e), 6 and 7, of the Covenant.

The facts as submitted by the author

2.1 Ms. Arredondo had been arrested for the first time on 29 March 1985 (Case No. 1), in Lima. At that time she had been accused of terrorist activities, including possession and transport of explosives. She had been acquitted of the charges and released after two trials, for which judgements were passed in August 1986 and November 1987.

2.2 At the time of her re-arrest on 1 June 1990 (Case No. 2), Ms. Sybila Arredondo was working as a human rights advocate in Lima, specializing in aid to indigenous groups.[1] She was arrested in the building where she worked, together with several people connected with the terrorist organization Shining Path (Sendero Luminoso).

2.3 Ms. Arredondo on arrest was accused of being a member of Socorro Popular, an organization which is allegedly a support unit of Sendero Luminoso, and sentenced to 12 years' imprisonment by a "faceless court" (tribunal sin rostro) (File No. 05-93). In a legal opinion prepared by counsel for Ms. Arredondo's defence, it is stated that she was convicted on the basis of her mere physical presence in the building at the same time as several members of Sendero Luminoso were arrested by the police. None of the other co-defendants accused her, nor were there any witnesses against her, nor any expert evidence which incriminated her. Counsel accepts that at the time of her arrest Sybila Arredondo was carrying a false electoral card (libreta electoral). In her submission the author provides a legal opinion by a Lima counsel where he states: "with regard to the allegations against Mrs. Sybila, it is regrettable that nothing whatsoever has been done to clear her nor to refute the allegations against her. No evidence in her favour was put forward and what is more she did not respond to any questioning by the police or before the Judge, and this was the way other people involved had acted, which gave the impression that they all acted in a concerted manner since they allegedly belonged to the same organization".

2.4 In May 1992, while she was in detention, proceedings (Case No. 3) were initiated against Ms. Arredondo for her participation in events which had occurred in the first week of May 1992, when the police had intervened at Miguel Castro Castro prison. The prosecution asked for a life sentence, in accordance with the new Peruvian anti-terrorist legislation. She was acquitted in October 1995, also by a "faceless court" (File No. 237-93).

2.5 Case No. 1, for which she had been tried in 1985, was reopened in November 1995 before a "faceless court" and she was sentenced to 15 years' imprisonment on 21 July 1997 (File No. 98-93).

2.6 Appeals were lodged in all three proceedings, twice by Ms. Arredondo on being convicted and once by the prosecution. The author acknowledges that domestic remedies have not been exhausted with respect to the criminal proceedings against her mother. She considers, however, that the proceedings have been unduly prolonged.

The complaint

3.1 The author claims that prison conditions are appalling, and that the inmates are allowed out of their 3 x 3 metre cells only for half an hour each day. They are allowed no writing materials, unless expressly authorized. Ms. Arredondo has been given permission to write three letters in the last three years. Any books brought to the prisoners are strictly censored and there is no guarantee that the prisoners will receive them. They have no access whatsoever to magazines, newspapers, radio or television. Only inmates on the first floor of B wing are allowed to work in workshops, as Ms. Arredondo is on the second floor, she is only permitted to do very rudimentary jobs. The quality of the food is poor. Any food supplies or toiletries have to be handed to the authorities in transparent bags, and no tinned or bottled products are allowed into the prison. Any medication, including vitamins and food supplements, has to be prescribed by the prison doctor. Many inmates suffer from psychiatric problems or contagious diseases. All inmates are housed together and there are no facilities for the sick. When inmates are taken to hospital, they are handcuffed and fettered. Inmates are allowed only one visit a month from their closest relatives. Visits are limited to 20 to 30 minutes. It is claimed that, according to Peruvian legislation, inmates are entitled to one visit a week. There is also a provision for direct contact between the prisoners and their children or grandchildren once every three months. Children have to enter the prison on their own, and the persons accompanying them must leave them at the prison entrance. Ms. Arredondo is visited once a month by her daughter and once every three months by her 5-year-old grandson, however, due to police controls applied to adult visitors, the two elder grandchildren (17 and 18 years old) do not visit her since by so doing they would acquire a police record.

3.2 The author claims that the judicial proceedings (in courts of "faceless judges") brought against her mother are not in conformity with article 14 of the Covenant. She also complains of the dilatory nature of the proceedings.

3.3 It is stated that the same matter is not being examined under another procedure of international investigation or settlement.

State party's observations and comments on admissibility

4 In its submission of 12 August 1997, the State party challenges the admissibility of the case on the grounds that domestic remedies have not been exhausted and that the victim's daughter is not legally entitled to submit the case on behalf of her mother. On the basis of the copies of two newspaper articles published in Chile, following the visit by several Chilean parliamentarians to Ms. Arredondo, the State party further claims that the latter does not desire favourable treatment and that she is prepared to wait for her case to be resolved.

5.1 In her comments on the State party's submissions, the author of the communication informs the Committee that she is in fact acting on behalf of and with the knowledge of her mother, because the latter is prevented from doing so herself. She again refers to the restrictions imposed on her mother in prison regarding visits, contact with the outside world, writing materials, etc.

5.2 With respect to the State party's claim that domestic remedies have not been exhausted, the author reiterates that her mother was arrested in 1985, accused of terrorism, tried and twice acquitted. After being re-arrested in 1990, the 1985 trial was reopened in 1995. In 1997, she was sentenced to 15 years. An appeal before the Supreme Court is still pending. The author therefore requests the Committee to consider the communication admissible on the ground of undue delay in domestic remedies caused by the State party. Ms. Arredondo was also sentenced to 12 years' imprisonment for belonging to Socorro Popular, a sentence which she is currently serving. She was acquitted of the accusation of taking part in the events at Miguel Castro Castro prison in May 1992, but an appeal was lodged against her acquittal by the Public Prosecutor and the matter is still pending.

5.3 The author reiterates that the treatment received by her mother in prison constitutes violations of articles 7 and 10 of the Covenant. By a letter of 28 September 1998, which was transmitted to the State party on 1 October 1998, Ms. Teillier also reiterates and gives more information about the circumstances surrounding the arrest of her mother, who was detained without a judicial warrant in violation of article 9 of the Covenant, and states that the trials which she has undergone have not complied with the requirements and guarantees laid down in article 14 of the Covenant.

The Committee's decision on admissibility

6.1 At its sixty-fourth session in October 1998, the Committee examined the admissibility of the communication and ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.2 On the question of the requirement concerning the exhaustion of domestic remedies, the Committee noted the State party's challenge of the admissibility of the communication on the ground of failure to exhaust domestic remedies. The Committee referred to its case law, in which it had repeatedly found that, for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must be effective and available, and must not be unduly prolonged. The Committee considered that, in the circumstances of the case, the remedies had been unduly prolonged. Ms. Arredondo was arrested in 1990 and tried for several offences, one of which dated back to 1985, and for which she had already twice been acquitted. By 28 September 1998, the case had still not been resolved. The Committee accordingly found that article 5, paragraph 2 (b), did not preclude consideration of the complaint.

6.3 With regard to the author's claims that the conditions in which her mother is detained constitute inhuman and degrading treatment in violation of articles 7 and 10 of the Covenant, the Committee found that these claims had been sufficiently substantiated for the purposes of admissibility and should be considered on their merits.

6.4 The author stated that her mother's arrests had not been effected in accordance with domestic legislation and were therefore in violation of article 9 of the Covenant. The Committee considered that this claim should be examined on its merits as it might raise issues under article 9 of the Covenant.

6.5 With regard to the claims that the author's mother had undergone trials which did not comply with the guarantees laid down in article 14 of the Covenant, the Committee noted that she had been tried by a special military court. It further noted the State party's position to the effect that the criminal proceedings against her had been conducted, and were continuing to be conducted, in accordance with the procedures established by the anti-terrorist legislation in force in Peru. However, the question is whether these proceedings were in conformity with article 14 of the Covenant. This point should be considered on its merits.

The State party's observations and the author's comments

7.1 In its submission dated 4 August 1999, the State party requested a review of admissibility since it considers that the victim's daughter lacks competence to submit the case on her mother's behalf; it takes the view that the victim could herself have communicated with the Committee without difficulties of any kind. Alternatively she could, in its opinion, have given her daughter express authorization or have sent such authorization through her lawyer or her son, who is resident in Chile and has visited his mother in prison. In its submission, the State party says that Ms. Arredondo's son has never indicated that his mother wished to submit a case to any international body.

7.2 The State party maintains that the author's submissions are the same as those presented to the Working Group on Arbitrary Detention on 29 February 1996 and the fact that the Working Group has not issued an opinion means that it did not find the detention to have been arbitrary. The State party accordingly concludes that there has been no arbitrary action. It requests the Committee, in conformity with the non bis in idem principle, to declare the communication inadmissible.

7.3 The State party further submits that, if the Committee, despite the submissions presented with the aim of declaring the case inadmissible, considers that it should continue with the case, it could only do so in respect of the proceedings still under way against Ms. Arredondo. In these proceedings a decision has still to be reached on an appeal for annulment and a delay in the administration of justice would have to be admitted; the question arising would be whether or not the delay has been justified. In the State party's view, the causes relate to the redress sought by communication No. 688/1996 and to the principal objective of obtaining a decision by the Committee recommending the Peruvian State to release Ms. Arredondo on the ground that in the proceedings against her in the internal courts the guarantees of due process have not been observed. In this respect, the State party recalls that three judicial proceedings were initiated against Ms. Arredondo: in one she was acquitted at final instance, in the second a decision on an appeal for annulment (of the 15-year prison sentence) is pending, and in the third she was sentenced to 12 years' imprisonment. She is currently serving this sentence in the special high-security prison for women in Chorrillos. In the State party's view, the aim of the present communication is to obtain a decision annulling the pending proceedings against her on the ground of "unjustified" delay in the administration of justice and to secure her subsequent release; the Peruvian State would thus have to annul the pending proceedings and initiate other proceedings, or declare her case closed. The State party points out that, if this course were followed, there would be no change in Ms. Arredondo's situation since, as has been stated, she is

serving a 12-year sentence. If the third judgement were confirmed, this would be combined with the current sentence and Ms. Arredondo would remain in prison until she completed the 15-year sentence requested in the second of the proceedings against her.

7.4 The State party submits that the trial in which Ms. Arredondo was sentenced conformed to the guarantees of due process and, at the national level, there have been no complaints, denunciations or appeals on the ground of alleged irregularities in the conduct of the trial. In addition, it has not been proved in this international body that there have been violations of guarantees in the administration of justice.

7.5 As regards the claims concerning Ms. Arredondo's conditions of detention, the State party maintains that, according to the information provided by the National Prison Institute (INPE), the conditions complained of are those which were established when the problem of terrorism was at its height in Peru. Now that the situation has changed, it has been considered advisable to ease the prison regime for persons convicted of terrorist offences, and so Supreme Decree No. 005-97-JUS, of which Ms. Arredondo is a beneficiary, has entered into force. Since entering the Chorrillos high-security prison for women and in accordance with the assessments of the prison board, Ms. Arredondo has been held in maximum-security conditions. She is at present sharing a cell for two persons in B wing.

7.6 As to the number of family visits Ms. Arredondo has received, the State party points out that, during 1998 and up to the present time, she has been visited by her daughter and her grandson. She has also been visited by her mother and by her son by special arrangement, and has received a Christmas visit from her grandchildren living in Chile.

7.7 The special maximum-security regime (first stage) in force in B wing comprises the benefits provided for in the above-mentioned law and consists of "two hours' exercise, a one-hour visit in a visiting room on Saturdays for women and on Sundays for men, manual or craft work in their cells". The State party also asserts that, under this regime, those prisoners who show signs of progress in their rehabilitation treatment have access to the workshops supervised by INPE personnel.

7.8 The State party maintains that Ms. Arredondo is currently writing a book about her husband, and this invalidates the claim that she is being deprived of access to writing materials. Every day the personnel responsible for the security of women prisoners hand her pen and paper. In addition, the State party maintains that women prisoners are not prevented from watching television; they are even permitted to see videotaped films once a fortnight, and are allowed to read books and periodicals, which are checked for reasons of national security to ensure that they do not contain material relating to subversive topics. As to leisure activities, they attend sports events and dances and listen to music.

7.9 As to the claims relating to the quality of the food given to women prisoners, the food contains the necessary calories and proteins and is prepared by the prisoners themselves, who take it in turns to do this in groups. Their work is assessed and a prize is awarded as an incentive to the best group.

7.10 Concerning the claim that prisoners are not allowed to receive medicines without the authorization of the prison doctor, the State party maintains that this requirement is prompted by security considerations and is aimed at preventing poisoning by out-of-date or inappropriate medicines, medicines taken without medical prescription or consumed in excessive quantities, or medicines which might in any other way endanger prisoners' health.

7.11 As to the claims relating to the treatment received by persons suffering from psychiatric problems, the State party says that it has a specialist who permanently evaluates the condition of women prisoners in this category and that they live in separate sectors in the various prison wings. They also receive work-therapy care in the open air in the countryside. Concerning the claims relating to contagious diseases, the State party says that there are few such cases and when they do occur, the necessary precautions are taken. On the question of the way in which prisoners are taken to and from hospital, transfers are effected in accordance with the directives of the Peruvian National Police (PNP). These directives are suited to the type of offence committed and are aimed at preventing escapes from treatment areas that might endanger other patients, since medical care is provided in public-sector hospitals.

7.12 Lastly, on the question of visits by children, according to the State party children are able to have direct contact with their relatives every Friday. On entering the prison, the children are taken by female PNP personnel to the place where they are to meet their relatives, who will be waiting for them, so as to prevent them from being frightened or mistakenly directed to other sectors. Adult relatives have an identification card in order to enter the prison; this establishes their relationship with the prisoner.

8.1 In her communication of 4 November 1999, Ms. Arredondo's daughter sent the Committee a certified photocopy of a general power of attorney and a handwritten letter signed by Ms. Arredondo supporting the proceedings initiated and pursued by her daughter on her behalf.

8.2 In her communication Ms. Teillier states that, although her mother does receive family visits, these take place in a visiting room with a double metal mesh between the prisoner and her relatives. There is no personal contact of any kind or any possibility of handing over any object. The relatives can only receive from the prisoners - after a mandatory examination by the guards - returned food receptacles and craft products. In addition, the relatives have to undergo a search before they are allowed to leave the prison. Visits by lawyers take place in the same conditions as visits by relatives.

8.3 As to the possibility of sending correspondence outside the prison, Ms. Teillier explains the procedure followed for this purpose. Once a week the women prisoners have to deposit any letter leaving the prison in a mail box in their wing. The letters are removed and checked by prison personnel. All the letters are read and not all of them survive this level of censorship. By way of example she states that, some weeks before, her mother had told her that she had deposited an envelope addressed to Ms. Teillier with the copy of the request concerning a health problem which her mother had sent to the prison governor. This letter never reached Ms. Teillier. Once the letters have been checked, on visiting days they are deposited in a box near the prison exit. The visitors collect the letters addressed to them and indeed any others, since nothing is done to ensure that they reach the correct addressee.

8.4 The author of the communication states that the complaint submitted on her mother's behalf relates specifically to the harsh prison conditions. She raises the question whether the representatives of the State party really believe that Ms. Arredondo can write and confidently send off her communications on this subject. She also says, as the State party itself has done, that all persons found guilty of terrorist offences, including Ms. Arredondo, are subject to continuing assessment by the prison board set up by the prison authorities. This board can easily consider complaints to be tantamount to "bad behaviour".

8.5 As to the second question regarding consideration of the case by more than one international body, Ms. Teillier says that, although the Working Group on Arbitrary Detention established by the United Nations Commission on Human Rights may indeed have transmitted to the Peruvian State a number of complaints including one concerning Ms. Arredondo (widow), she is unaware of such a communication. Concerning the logical assumption mentioned in section 12 of the State party's communication to the effect that the Working Group "did not consider the detention of Ms. Arredondo to be arbitrary", she believes this interpretation to be far-fetched. The author suggests that it could be more accurately assumed that note was taken of the "dual consideration" and consequently any further action was suspended.

8.6 As to the "ultimate aim", the author states that this is not necessarily to "reach a decision annulling the pending proceedings", i.e. the proceedings which began 14 years ago in 1985, but rather to ensure that the Supreme Court takes a decision. She reiterates that if the Supreme Court confirmed the 15-year sentence handed down in July 1997 (two years and three months before), her mother would be eligible for the prison benefits corresponding to the legislation of that time. These benefits would allow her to leave prison since the 12-year sentence would be subsumed under the longer sentence. And if this decision was not reached in the short term, it might happen that, having completed the 12-year sentence, she would be forbidden to leave prison or be arrested immediately and again subjected to the interminable trial proceedings.

8.7 On the question of the trial that led to a 12-year prison sentence, the author maintains that it is not true that no complaints, denunciations or appeals have been lodged at the national level, as the State party claims. The annulment appeal was lodged with the competent organs but was rejected. The fact of the matter is that there are no more organs to be appealed to. In this connection, the author recalls that this trial also took place in accordance with the 1992 legislation, under the faceless judges system.

8.8 As to conditions of detention, it is true that in Chorrillos they are not so harsh as they had been at the Callao Naval Base, Yanamayo and Challapalca, but they still constitute a punishment regime. In this connection she repeats that although she is able to visit her mother for one hour once a week on Saturdays, the visit takes place in a room where no direct contact is possible and they are unable to speak freely. When she visits her mother, she takes along some food to make up for the deficiencies in the prisoners' daily diet, due to the low budget allocation by the State. Since the appointment of the new prison governor, who is a National Police colonel, the introduction of food has again been restricted and a list of permitted products has been published.

8.9 On the question of the State party's statement that there are few cases of contagious diseases, the author says that in B wing alone there have been 15 cases of tuberculosis among approximately 100 prisoners. Three of these cases occurred during the second half of 1999. As an example of the difficulties existing with regard to health matters, the author explains that for several months her mother has been awaiting authorization from the prison governor to go to the hospital for x-rays on her knee. These x-rays have been requested by the prison orthopaedic physician and by the INPE specialist (18 July 1999). Subsequently two medical committees have held meetings to authorize her mother's hospital visit, but by 4 November 1999 the visit had still not taken place.

8.10 The author states that, although the matter does not directly affect her mother, she cannot but dispute the information provided by the State party concerning the conditions in which women prisoners with psychiatric problems are held, since they are not separated from the rest of the prison population. Moreover, they receive no work-therapy care in the countryside. She regrets that the Committee has been misinformed on this point.

8.11 As to the claim that prisoners are not prevented from watching television and that they are allowed to watch films every two weeks, this is simply not true. They are allowed to watch films only when these are scheduled by the prison authorities. They are not allowed to watch the news or any other programme broadcast by local channels. Furthermore, they are still not allowed to listen to the radio or to read current periodicals or magazines. The introduction of books into the prison also continues to be restricted. As for the statement that there is a continuing policy, based on security considerations, of preventing prisoners from reading material that might contain subversive topics, the author wonders what is subversive about the official gazette El Peruano, which her mother was recently not allowed to receive.

8.12 Lastly, concerning visits by children to B wing, these take place on Sunday mornings but only occasionally are the children escorted by women warders. In any event, they enter the prison alone and are searched alone. In the author's opinion, this certainly has incalculable consequences for the children.

Consideration on the merits

9. The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

10.1 As regards the State party's claim concerning the lack of competence of Ms. Arredondo's daughter to take action before the Human Rights Committee, the Committee notes that it is in possession of adequate written authorization provided by Ms. Arredondo to her daughter (see para. 8.1 above) and considers that this is sufficient to enable her to act on her mother's behalf. It also considers that Ms. Teillier is acting after full discussion with her mother.

10.2 The Committee takes note of the claim of inadmissibility made by the State party on the grounds that the present communication is before another international procedure of investigation or settlement body, since the Working Group on Arbitrary Detention of the United Nations Commission on Human Rights has, at Ms. Arredondo's request, taken up the

question. The Committee decides to reach no decision on whether this matter falls within the scope of article 2 paragraph 5 a of the Optional Protocol, since it has received information from the Working Group that it realized the existence of the present communication and has referred the case to the Committee without any expression of its views.[2]

10.3 On the question of whether Ms. Arredondo's arrest was carried out in conformity with the requirements of article 9, paragraphs 1 and 3, of the Covenant, in other words, whether she was arrested on the basis of an arrest warrant, and whether or not, after being taken to police premises, she was promptly brought before a judge, the Committee regrets that the State party has not replied specifically to the allegation made, but has, in a general fashion, said that the detention and trial of Ms. Arredondo were conducted in conformity with Peruvian laws. The Committee considers that, since the State party has not replied to these allegations, due weight must be given to them and it must be assumed that the events occurred as described by the author. Consequently, the Committee finds a violation of article 9, paragraphs 1 and 3, of the Covenant.

10.4 As to the author's submissions concerning her mother's conditions of detention, contained in paragraph 3.1 and reiterated in paragraphs 8.3, 8.4 and 8.8-8.12 above, the Committee takes note of the State party's acceptance of the description of these conditions is accurate, and that they are justified by the seriousness of the offences committed by the prisoners and by the serious problem of terrorism which the State party experienced. The Committee furthermore notes Supreme Decree No. 005-97-JUS, as referred to above. It considers that the conditions of Ms. Arredondo's detention, especially in the earlier years and to a lesser extent since the Supreme Decree's entry into force, are excessively restrictive. Even though it recognizes the need for security restrictions, these always have to be justified. In the present case, the State party has failed to provide any justification for the conditions described in Ms. Teillier's submission. The Committee subsequently finds that the conditions of detention infringe article 10, paragraph 1, of the Covenant.

10.5 As to the author's complaint that her mother did not have a trial affording the guarantees of article 14 of the Covenant because she was tried by a court consisting of faceless judges, it has taken note of the book "Terrorismo: Tratamiento juridico, Insituto de Defensa legal, Lima, 1995, pp. 288-290)" on which the author has relied to describe the process of trial before faceless judge courts.[3] it takes note of the State party's statement that Ms. Arredondo's three trials were conducted in accordance with the national legislation in force at that time. It reiterates its jurisprudence to the effect that the trials conducted by the faceless courts in Peru were contrary to article 14.1 of the Covenant since the accused did not enjoy the guarantees provided by that article.[4]

10.6 As for the delays in the legal process, in violation of article 14, paragraph 3 (c), the Committee notes that the State party acknowledges a delay and that, despite instructions said to have been given to decide the case, the appeal on the reopened case remains unresolved. Given that the reopening, by the prosecution in 1995 of Ms. Arredondo's second acquittal of 1987, involves such unacceptable delays, the Committee finds that this constitutes a violation of article 14, paragraph 3 (c), of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee constitute violations of article 10, paragraph 1, of the Covenant as regards Ms. Arredondo's conditions of detention; of article 9 as regards the manner of her arrest; of article 14, paragraph 1, as regards her trial by a court made up of "faceless judges"; of article 14, paragraph 3 (c), with respect to the delay in the completion of the proceedings initiated in 1985.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Ms. Arredondo with an effective remedy. The Committee considers that Ms. Arredondo should be released and adequately compensated. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] By letter of 21 March 1999, the author informed the Committee that, although her mother had indeed been working as a human rights advocate at the time of her arrest, she was working on the compilation of the second part of the complete works of José Maria Arguedas.

[2] See opinion No. 4/2000 adopted on 16 May 2000.

[3] "The anonymity of the magistrates, as pointed out by the Goldman Commission, deprives an accused of the basic legal guarantees: an accused does not know who is judging him or whether the person is competent to do so (for example, if they have the necessary legal training and experience); an accused is deprived of the right to be tired by an impartial tribunal since he cannot recuse the judge [Report of the International Commission of Jurist on the administration of Justice in Peru. Instituto de Defensa Legal, Lima, 1994, p. 67]".

[4] See Views No. 577/1994, paragraph 8 (8), Victor Polay Campos v. Peru, adopted on 6 November 1997.

F. Communication No. 689/1996, Maille v. France
(Views adopted on 10 July 2000, sixty-ninth session)*

Submitted by:	Mr. Richard Maille (represented by François Roux, legal counsel)
Alleged victim:	The author
State party:	France
Date of the communication:	17 November 1995
Date of admissibility decision:	11 July 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 10 July 2000,

Having concluded its consideration of communication No. 689/1996 submitted to the Human Rights Committee by Mr. Richard Maille under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Richard Maille, a French citizen born in December 1966 and currently residing in Millau, France. He claims to be a victim of violations by France of articles 18, 19 and 26, juncto article 8, of the International Covenant on Civil and Political Rights. He is represented by counsel, François Roux.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden, and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the examination of the case. The text of an individual opinion by Committee members Nisuke Ando, Eckart Klein, David Kretzmer and Abdallah Zakhia is appended to this document.

The facts as submitted by the author

2.1 From June 1986 to July 1987 the author, a recognized conscientious objector, performed civilian national service duties. On 15 July 1987, after approximately one year of carrying out those duties, he left his duty station, invoking the allegedly discriminatory character of article 116, paragraph 6, of the National Service Code (Code du service national), pursuant to which conscientious objectors had been required to carry out civilian national service duties for a period of two years, whereas military service for conscripts had lasted one year.

2.2 As a result of his action, Mr. Maille was charged with insubordination in peacetime, pursuant to article 397, paragraph 1, of the Code of Military Justice. By a judgement of 27 January 1992, the Criminal Court (Tribunal Correctionnel) of Montpellier found him guilty as charged and sentenced him to 15 days' imprisonment (suspended). As the author had not completed his civilian service duties, he received an order dated 30 July 1992 to resume those duties; Mr. Maille decided to ignore the order. Accordingly, the Criminal Court of Montpellier resumed proceedings against him and, on 21 April 1994, found him guilty as charged and decided to rescind the decision recognizing him as a conscientious objector. On 23 January 1995, the Court of Appeal of Montpellier confirmed the judgement.

2.3 The author indicates that he did not further appeal to the Court of Cassation because, in the circumstances of his case and given the Court of Cassation's established jurisprudence unfavourable to him such an appeal would be futile. In this connection, he refers to several judgements handed down on 14 December 1994 by the Court of Cassation, which concluded that article 116 (6) was not discriminatory and did not violate articles 9,10 and 14 of the European Convention on Human Rights [1] The author concludes that as no further effective remedy is available to him, he should be deemed to have complied with the requirements of article 5, paragraph 2(b), of the Optional Protocol.

The complaint

3.1 According to the author, both article 116 (6) of the National Service Code (in its version of July 1983 prescribing a period of 24 months of civilian service for conscientious objectors) and article L.2 of the National Service Code in its version of January 1992 (as amended by Act No. 92-9 of 4 January 1999), which sets the duration of civilian service for conscientious objectors at 20 months, violate articles 18, 19 and 26, juncto article 8, of the Covenant in that they double the duration of service for conscientious objectors in comparison with that for persons performing military service.

3.2 The author acknowledges that in case No. 295/1988,[2] the Committee had held that an extended length of alternative service was neither unreasonable nor punitive, and has found no violation of the Covenant. However, he invokes the individual opinions appended to those views by three members of the Committee, who had concluded that the challenged legislation was not based on reasonable or objective criteria, such as a more severe type of service or the need for special training in order to perform the longer service. The author fully endorses the conclusions of those three members of the Committee.

3.3 The author observes that articles L.116(2) to L.116(4) of the National Service Code provide for a rigorous test of the sincerity of the convictions of a conscientious objector. Each application for recognition as a conscientious objector has to be approved by the Minister for the Armed Forces. If he refuses, an appeal to the Administrative Tribunal is possible under article L.116 (3). In such circumstances, the author argues, it cannot be assumed that the length of civilian service was fixed purely for reasons of administrative convenience, since anyone agreeing to perform civilian service twice (or almost) as long as military service should be deemed to have genuine convictions. Rather, the length of civilian service must be deemed to have a punitive character, which is not based on reasonable or objective criteria.

3.4 In support of his contention, the author invokes a judgement of the Italian Constitutional Court of July 1989, which held that the provision for non-military service lasting eight months longer than military service was incompatible with the Italian Constitution. He further points to a decision adopted by the European Parliament in 1967 which, on the basis of article 9 of the European Convention on Human Rights, suggested that the duration of alternative service should be the same as that for military service. Moreover, the Committee of Ministers of the Council of Europe has declared that alternative service must not have a punitive character and that its duration, in relation to military service, must remain within reasonable limits (Recommendation No. R(87)8 of 9 April 1987). Finally, the author notes that the United Nations Commission on Human Rights declared, in a resolution adopted on 5 March 1987,[3] that conscientious objection to military service should be regarded as a legitimate exercise of the right to freedom of thought, conscience and religion, as recognized by the Covenant.

3.5 In these circumstances, the author submits that requiring him to perform civilian service for a period that is twice as long as that set for military service constitutes unlawful and prohibited discrimination on the basis of opinion, and that the possibility of imprisonment for refusal to perform civilian service beyond the length of time of military service constitutes a violation of articles 18, paragraph 2, 19, paragraph 1, and 26 of the Covenant.

The State party's observations on admissibility and the author's comments thereon

4.1 The State party contends that the communication is incompatible ratione materiae with the provisions of the Covenant since, on the one hand, the Committee has acknowledged in its decision on communication No. 185/1984 (L.T.K. v. Finland) that "the Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of article 8, can be construed as to imply that right" and since, on the other hand, by virtue of article 8, paragraph 3 (c) (ii) of the Covenant, the internal regulation of national service, and therefore of conscientious objector status for those States which recognize it, does not fall within the scope of the Covenant and remains a matter for domestic legislation.

4.2 Subsidiarily, the State party contends that domestic remedies have not been exhausted by the author. In this connection, it submits that the author of the communication has not exhausted the available judicial remedies since he has not appealed the Montpellier Court of Appeal's judgement of 23 January 1995 to the Court of Cassation. The State party further submits that the author has not exhausted all administrative remedies. The argument put forward in this connection is that, by leaving his duty station before having received a reply from the military

authorities concerning his request for a reduction in the length of his service, the author violated the provisions of the National Service Code, thus becoming liable to criminal prosecution, and did not wait for the military authorities to refuse his request and then bring the matter before the Administrative Tribunal.[4]

4.3 Lastly, the State party contends that the author does not qualify as a victim. With regard to articles 18 and 19 of the Covenant, the State party claims that by recognizing conscientious objector status and offering conscripts a choice as to the form of their national service, it allows them to opt freely for the national service appropriate to their beliefs, thus enabling them to exercise their rights under articles 18 and 19 of the Covenant. In this connection, the State party concludes, quoting the decision on communication No. 185/1984 cited above, that as the author was "not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service", he cannot therefore claim to be a victim of a violation of articles 18 and 19 of the Covenant.

4.4 With regard to the alleged violation of article 26 of the Covenant, the State party, noting that the author complains of a violation of this article because the length of alternative civilian service is double that of military service,, submits first of all that "the Covenant, while prohibiting discrimination and guaranteeing equal protection of the law to everyone, does not prohibit all differences of treatment", which must be "based on reasonable and objective criteria" (see the Committee's views on communication No. 196/1985, Gueye v. France). The State party argues in this connection that the situation of conscripts performing alternative civilian service differs from that of those performing military service, notably in respect of the heavier constraints of service in the army, and that a longer period of alternative civilian service constitutes a test of the sincerity of conscientious objectors designed to prevent conscripts from claiming conscientious objector status for reasons of comfort, ease and security. The State party quotes the Committee's views on communication No. 295/1988 (Järvinen v. Finland), where the Committee held that the 16-month period of alternative service imposed for conscientious objectors - double the eight-month period of military service - was "neither unreasonable nor punitive". The State party therefore concludes that the difference of treatment complained of by the author is based on the principle of equality, which requires different treatment of different situations.

4.5 For all of these reasons, the State party requests the Committee to declare the communication inadmissible.

5.1 Concerning the State party's argument as to the Committee's competence ratione materiae, the author cites the Committee's General Comment No. 22 (48), where it is stated that the right to conscientious objection "can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service". According to the author, it is clear from these comments that the Committee is competent to determine whether or not there has been a violation of the right to conscientious objection under article 18 of the Covenant.

5.2 The author claims that the problem posed in his case lies not in a possible infringement of conscientious objectors' freedom of belief by French legislation, but in the conditions for the exercise of that freedom, since alternative civilian service is twice the length of military service, without this being justified by any provision to protect public order, in violation of article 18, paragraph 3, of the Covenant. The author invokes in this context the Committee's General Comment No. 22 (48), which states that "limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. (...) Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner" and concludes that requiring conscientious objectors to perform alternative civilian service which is twice the length of military service constitutes a discriminatory restriction on the enjoyment of the rights set forth in article 18 of the Covenant.

5.3 As to the question of the exhaustion of domestic remedies, the author states that an appeal to the Court of Cassation against the Court of Appeal's decision of 23 January 1995 would have been futile as it would have had no reasonable chance of success in view of the Court of Cassation's established jurisprudence on the matter. In this connection, the author cites three judgements of the Court of Cassation (judgement of 14 December 1994 in the Paul Nicolas, Marc Venier and Frederic Foin cases), where the Court held that article 116 (6) of the National Service Code fixing the length of military service and alternative forms of service was not discriminatory. The author therefore concludes that he has exhausted all effective domestic remedies in respect of the proceedings brought against him. With regard to the non-exhaustion of administrative remedies, the author maintains that such remedies were not open to him inasmuch as, not having been notified of any administrative decision, he could not bring the matter before the Administrative Tribunal.

5.4 Concerning the alleged violation of article 26, the author claims that requiring a period of civilian service twice the length of military service constitutes a difference of treatment which is not based on "reasonable and objective criteria" and therefore constitutes discrimination prohibited by the Covenant (communication No. 196/1985 cited above). In support of this conclusion, the author argues that there is no justification for making civilian service twice the length of military service; in fact, unlike in the Jarvinen case (communication No. 295/1988 cited above), the longer duration is not justified by any relaxation of the administrative procedures for obtaining conscientious objector status since, under articles L.116(2) and L.116 (4) of the National Service Code, applications for conscientious objector status are subject to approval by the Minister for the Armed Forces following an examination which may result in refusal. Nor is it justified in the general interest or as a test of the seriousness and sincerity of the beliefs of the conscientious objector. Indeed, the mere fact of taking special steps to test the sincerity and seriousness of the beliefs of conscientious objectors in itself constitutes discrimination based on the recognition of a difference of treatment between conscripts. Furthermore, conscientious objectors derive no benefit or privilege from their status - unlike, for example, persons assigned to perform international cooperation services instead of military service, who have the opportunity to work abroad in a professional field corresponding to their university qualifications for 16 months (i.e. four months less than the civilian service for conscientious objectors) and a difference of treatment is not, therefore, justified on that ground.

Issues and proceedings before the Committee

6.1 At its sixtieth session, the Human Rights Committee considered the admissibility of the communication.

6.2 Concerning the requirement of exhaustion of available domestic remedies, the Committee took note of the fact that the author had not exhausted all the judicial remedies that were open to him. However, the Committee observed that an appeal by the author to the Court of Cassation against the Court of Appeal's judgement of 23 January 1995 would undoubtedly have been rejected by the Court of Cassation, inasmuch as it had dismissed earlier similar appeals based on the allegedly discriminatory nature of article 116 (6) of the National Service Code. From these legal precedents it might be concluded that an appeal by the author to the Court of Cassation would have had no chance of success. The Committee therefore considered that effective judicial remedies had been exhausted by the author.

6.3 As to the argument of the State party that the author had not exhausted all administrative remedies, the Committee noted that it did not appear from the State party's observations that any administrative decision was taken against the author, and that consequently no administrative appeal was immediately available to him at the time of the interruption of his civilian service. Nevertheless, the Committee noted also that by not waiting for the military authorities to respond to his decision to interrupt his civilian service after one year, and by choosing to leave his post after merely notifying those authorities, the author voluntarily did not avail himself of administrative remedies although, as indicated by the State party, it was open to him to lodge an administrative appeal challenging the applicability of a law as being contrary to the State party's international commitments to protect human rights. Notwithstanding this argument, however, the Committee noted that administrative remedies were no longer available to the author of the communication at this stage of the proceedings. The Committee therefore concluded that it was not prevented by article 5, paragraph 2 (b), of the Optional Protocol from dealing with the communication.

6.4 The Committee took note of the State party's arguments concerning the incompatibility of the communication ratione materiae with the provisions of the Covenant. In this regard, the Committee considered that the matter raised in the communication did not concern a violation of the right to conscientious objection as such. The Committee considered that the author had sufficiently demonstrated, for the purposes of admissibility, that the communication might raise issues under provisions of the Covenant.

7. Accordingly, on 11 July 1997, the Committee decided that the communication was admissible.

The State party's observations on the merits of the communication

8.1 By submission of 29 June 1998, the State party addresses the merits of the communication and at the same time requests the Committee to review its decision declaring the communication admissible.

8.2 The State party recalls that the author left his post the day after he had informed the authorities by letter that he was seeking a reduction in the time of service. He did not await the outcome of his request. The State party argues that he should have and that in case of a negative answer, or the absence of an answer after four months, he could have appealed to the administrative tribunal. In this context, the State party recalls that following the judgement by the Conseil d'Etat in the Nicolo case (20 October 1989) individuals may contest the applicability of the law for reasons of incompatibility with international human rights obligations. The State party notes that, in its decision on admissibility, the Committee has recognized the existence of this remedy, but concluded that domestic remedies had nevertheless been exhausted because the remedy was no longer available to the author at this stage of the proceedings.

8.3 The State party challenges the Committee's decision in this respect and argues that the availability and effectiveness of a remedy have to be considered at the moment of the occurrence of the alleged violation, and not a posteriori, at the moment the author presents his communication. If not, it would suffice to abstain voluntarily from exhausting domestic remedies in the time and form prescribed by law in order to comply with the requirement of article 5(2)(b), which would make the requirement obsolete.

8.4 With regard to the exhaustion of domestic remedies in the criminal matter against the author, the State party recalls that there would have been no need for criminal proceedings in the author's case, if he had awaited the outcome of his request to the Minister. In this context, the State party emphasizes that the rule of exhaustion of domestic remedies implies that one exhausts all effective remedies, that is those remedies that can effectively redress the alleged violation. In the present case, the author complained about the length of the service for conscientious objectors. The available remedy was to present his claim to the military authorities, and then, if necessary, to appeal to the administrative tribunals. In its decision on admissibility, the Committee recognized that this possibility existed. It has not been shown that this procedure would have been ineffective or would have been unreasonably delayed. Consequently, the State party requests the Committee to review its decision on admissibility and to declare the communication inadmissible for failure to exhaust domestic remedies.

8.5 As to the merits, the State party argues that the author is not a victim of a violation of the Covenant.

8.6 According to the State party, article L.116 of the National Service Code in its version of July 1983 instituted a genuine right to conscientious objection, in the sense that the sincerity of the objections is said to be shown by the request alone, if presented in accordance with the legal requirements (that is, justified by an affirmation of the applicant that he has personal objections to using weapons). No verification of the objections took place. To be admissible, requests had to be presented on the 15th of the month preceding the incorporation into the military service. Thus a request could only be rejected if it was not justified or if it was not presented in time. A right to appeal existed to the administrative tribunal.

8.7 Although the normal length of military service since January 1992 in France was 10 months, some forms of national service lasted 12 months (military service of scientists) and 16 months (civil service of technical assistance). The length of the service for conscientious objectors was 20 months. The State party denies that the length has a punitive or discriminatory

character. It is said to be the only way to verify the seriousness of the objections, since the objections are no longer tested by the administration. After having fulfilled their service, conscientious objectors have the same rights as those who have finished civil national service.

8.8 The State party informs the Committee that on 28 October 1997 a law was adopted to reform the national service. Under this law, all young men and women will have to participate between their 16th and 18th birthday in a one day call-up to prepare for defence. Optional voluntary service can be done for a duration of 12 months, renewable up to 60 months. The new law is applicable to men born after 31 December 1978 and women born after 31 December 1982.

8.9 According to the State party, its system of conscientious objection was in accordance with the requirements of articles 18, 19 and 26 of the Covenant, and with the Committee's general comment No. 22. The State party notes that its regime for conscientious objection did not make any difference on the basis of belief, and no process of verification of the reasons forwarded by the applicants occurred, other than in many neighbouring countries. No discrimination existed against conscientious objectors, as their service was a recognized form of the national service, on equal footing with military service or other forms of civil service. In 1997, just under 50 per cent of those performing civil service were doing this on the basis of conscientious objections to military service.

8.10 The State party submits that the author of the present communication has not at all been discriminated on the basis of his choice to perform national service as a conscientious objector. It notes that the author was convicted for not complying with his obligations under the civil service, which he had freely chosen. After leaving his duty station without authorisation, the author was summoned several times to report at work but failed to do so. His conviction was thus not because of his personal beliefs, nor on the basis of his choice for alternative civil service, but on the basis of his refusal to respect the conditions of that type of service. The State party notes that at the time when the author requested to perform alternative military service, he had not indicated any objection to the length of service. In this context, the State party notes that it would have been open to the author to choose another form of unarmed national service, such as one of technical assistance. On this basis, the State party argues that the author has not established that he is a victim of a violation by the State party.

8.11 Subsidiarily, the State party argues that the author's claim is ill-founded. In this context, the State party recalls that according to the Committee's own jurisprudence, not all differences in treatment constitute discrimination, as long as they are based on reasonable and objective criteria. In this context, the State party refers to the Committee's Views in case No. 295/1988 (Jarvinen v. Finland), where the service for conscientious objectors was 16 months and that for other conscripts 8 months, but the Committee found that no violation of the Covenant had occurred because the length of the service ensured that those applying for conscientious objector status would be serious, since no further verification of the objections occurred. The State party submits that the same reasoning should apply to the present case.

8.12 In this context, the State party also notes that the conditions of the alternative civil service were less onerous than that of military service. The conscientious objectors had a wide choice of posts. They could also propose their own employer and could do their service within their professional interest. They also received a higher indemnity than those serving in the

armed forces. In this context, the State party rejects counsel's claim that the persons performing international cooperation service received privileged treatment vis à vis conscientious objectors, and submits that those performing international cooperation service did so in often very difficult situations in a foreign country, whereas the conscientious objectors performed their service in France. In the author's case, he performed his civil service in the Vaucluse, where he was responsible for the maintenance of forest roads, which corresponds with his professional background as an agricultural technician.

8.13. The State party concludes that the length of service for the author of the present communication had no discriminatory character compared with other forms of civil service or military service. The differences that existed in the length of the service were reasonable and reflected objective differences between the types of service. Moreover, the State party submits that in most European countries the time of service for conscientious objectors is longer than military service.

Counsel's comments on the State party's submission

9.1. In his comments of 21 December 1998, counsel argues that article 5(2)(b) of the Covenant does not require that an individual exhaust all imaginable remedies that are not effective or available. In the instant case, the author has been subjected to criminal proceedings for subordination in peace time. Counsel recalls that the requirement of exhaustion of domestic remedies does not apply when the domestic remedy is ineffective and provides no chance of success, or when due to circumstances an existing remedy has become impossible or ineffective. The author awaited the outcome of the effective domestic remedies concerning the criminal proceedings before coming to the Committee. As far as administrative remedies are concerned, the author has never been notified of an administrative decision against which he could have appealed. In the absence of such a decision, exhaustion of administrative remedies is illusory. In this context, counsel recalls that the letter sent by the author to the military authorities was a simple notification, and did not contain any request requiring an answer from the military authorities. Counsel concludes that administrative remedies were not available to the author at the time.

9.2. As to the merits, counsel submits that at issue are the modalities of civil service for conscientious objectors. He submits that the double length of this service was not justified by any reason of public order and refers in this context to paragraph 3 of article 18 of the Covenant which provides that the right to manifest one's religion or beliefs may be subject only to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of others. He also refers to the Committee's general comment No. 22 where the Committee stated that restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. He argues that the imposition upon conscientious objectors of civil service of double length as that of the military service constitutes a discriminatory restriction, because the manifestation of a conviction such as the refusal to carry arms, does not in itself affect the public safety, order, health, or morals or the fundamental rights and freedoms of others since the law expressly recognizes the right to conscientious objection.

9.3 Counsel states that, contrary to what the State party has submitted, persons who requested status as a conscientious objector were subject to administrative verification and did not have a choice as to the conditions of service. In this context, counsel refers to the legal requirements that a request had to be submitted before the 15th of the month of incorporation into the military service, and that it had to be justified. Thus, the Minister for the Armed Forces might refuse a request and no automatic right to conscientious objector status existed. According to counsel, it is therefore clear that the reasons given by the conscientious objector were being tested.

9.4 Counsel rejects the State party's argument that the author himself had made an informed choice as to the kind of service he was going to perform. Counsel emphasizes that the author made his choice on the basis of his conviction, not on the basis of the length of service. He had no choice in the modalities of the service. Counsel argues that no reasons of public order exist to justify that the length of civil service for conscientious objectors be twice the length of military service.

9.5 Counsel maintains that the length of service constitutes discrimination on the basis of opinion. Referring to the Committee's Views in communication No. 295/1988 (Järvinen v. Finland), counsel submits that the present case is to be distinguished, since in the earlier case the extra length of service was justified, in the opinion of the majority in the Committee, by the absence of administrative formalities in having the status of conscientious objector recognized.

9.6 As far as other forms of civil service are concerned, especially those doing international cooperation service, counsel rejects the State party's argument that these were often performed in difficult conditions and on the contrary, asserts that this service was often fulfilled in another European country and under pleasant conditions. Those performing the service moreover built up a professional experience. According to counsel, the conscientious objector did not draw any benefit from his service. As regards the State party's argument that the extra length of service is a test for the seriousness of a person's objections, counsel argues that to test the seriousness of conscientious objectors constitutes in itself a flagrant discrimination, since those who applied for another form of civil service were not being subjected to a test of their sincerity. With regard to the advantages mentioned by the State party (such as no obligation to carry a uniform, not being under military discipline), counsel notes that the same advantages were being enjoyed by those performing other kinds of civil service and that these did not exceed 16 months. With regard to the State party's argument that the conscientious objectors received a higher pay than those performing military service, counsel notes that they worked in structures where they were treated as employees and that it was thus normal that they would receive a certain remuneration. He states that the pay was little in comparison with the work done and much less than that received by normal employees. According to counsel, those performing cooperation service were better paid.

Issues and proceedings before the Committee

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

10.2 The Committee has noted the State party's request for a review of the Committee's admissibility decision in the present case. The Committee takes this opportunity to clarify its decision on admissibility and in particular to respond to the State party's concerns. The Committee emphasizes that under article 5(2)(b) of the Optional Protocol an individual, at the material time, has to exhaust available domestic remedies within the time and form as required by domestic legislation. In the instant case, the author was charged with and found guilty of insubordination. The Court of Appeal of Montpellier dismissed his appeal, and a further appeal to the Court of Cassation would not have succeeded, since that Court had recently rejected three cases similar to the author's. In this context, the Committee notes that the State party has not shown how an administrative tribunal could have taken a different position than that of the highest court of the country on the author's argument that the length of service for conscientious objectors was in breach of the State's international obligations. There is thus no reason to revise the decision on admissibility and the Committee continues with the examination of the communication on its merits.

10.3 The Committee has noted the State party's argument that the author is not a victim of any violation, because he was not convicted for his personal beliefs, but for deserting the service freely chosen by him. The Committee notes, however, that during the proceedings before the courts, the author raised the right to equality of treatment between conscientious objectors and military conscripts as a defence justifying his desertion and that the courts' decisions refer to such claim. It also notes that the author contends that, as a conscientious objector to military service, he had no free choice in the service that he had to perform. The Committee therefore considers that the author qualifies as a victim for purposes of the Optional Protocol.

10.4 The issue before the Committee is whether the specific conditions under which alternative service had to be performed by the author constitute a violation of the Covenant.[5] The Committee observes that under article 8 of the Covenant, States parties may require service of a military character and, in case of conscientious objection, alternative national service, provided that such service is not discriminatory. The author has claimed that the requirement, under French law, of a length of 24 months for national alternative service, rather than 12 months for military service, is discriminatory and violates the principle of equality before the law and equal protection of the law set forth in article 26 of the Covenant. The Committee reiterates its position that article 26 does not prohibit all differences of treatment. Any differentiation, as the Committee has had the opportunity to state repeatedly, must however be based on reasonable and objective criteria. In this context, the Committee recognizes that the law and practice may establish differences between military and national alternative service and that such differences may, in a particular case, justify a longer period of service, provided that the differentiation is based on reasonable and objective criteria, such as the nature of the specific service concerned or the need for a special training in order to accomplish that service. In the present case, however, the reasons forwarded by the State party do not refer to such criteria or refer to criteria in general terms without specific reference to the author's case, and are rather based on the argument that doubling the length of service was the only way to test the sincerity of an individual's convictions. In the Committee's view, such argument does not satisfy the requirement that the difference in treatment involved in the present case was based on reasonable and objective criteria. In the circumstances, the Committee finds that a violation of article 26 occurred, since the author was discriminated against on the basis of his conviction of conscience.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. The Human Rights Committee notes with satisfaction that the State party has changed the law so that similar violations will no longer occur in the future. In the circumstances of the present case, the Committee considers that the finding of a violation constitutes sufficient remedy for the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Judgements of 14 December 1994 in the Foin and Nicolas cases.

[2] Jarvinen v. Finland, views adopted on 25 July 1990, paras. 6.4 to 6.6.

[3] E/CN.4/1987/L.73 dated 5 March 1987.

[4] There is no indication that the author actually requested a reduction in service.

[5] See also the Committee's Views in case No. 666/1995, Foin v. France, CCPR/C/67/D/666/1995.

APPENDIX

Individual opinion by Nisuke Ando, Eckart Klein, David Kretzmer and Abdallah Zakhia (dissenting)

We dissent from the Committee's Views for the same reasons we have laid down in our separate dissenting opinion on the Foin case (Communication No. 666/1995).

(Signed) N. Ando

(Signed) E. Klein

(Signed) D. Kretzmer

(Signed) A. Zakhia

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

G. Communication Nos. 690/1996 and 691/1996, Venier & Nicolas v. France (Views adopted on 10 July 2000, sixty-ninth session)*

Submitted by:	Marc Venier and Paul Nicolas (represented by François Roux, legal counsel)
Alleged victim:	The authors
State party:	France
Date of communications:	14 and 17 November 1995
Date of admissibility decision:	11 July 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 10 July 2000,

Having concluded its consideration of communications No. 690/1996 & 691/1996 submitted to the Human Rights Committee by Marc Venier and Paul Nicolas under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communications, dated 14 and 17 November 1995, are Marc Venier and Paul Nicolas, French citizens born in 1967 and 1968, respectively, and currently domiciled at Audincourt, France and Gabarret, France, respectively. They claim to be victims of violations by France of articles 18, 19 and 26, juncto article 8, of the International Covenant on Civil and Political Rights. The authors are represented by counsel, François Roux.

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. P.N. Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden, Mr. Abdallah Zakhia. Under rule 85 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the examination of the case. The text of an individual opinion by Committee members Nisuke Ando, Eckart Klein, David Kretzmer and Abdallah Zakhia is appended to this document.

The facts as submitted by the authors

2.1 The authors, recognized conscientious objectors, began their civilian service duties on 23 June 1988 (Mr. Nicolas) and 16 November 1989 (Mr. Venier). After approximately one year of service, the authors notified the authorities that they intended to cease performing their civilian service duties, and did so on 1 July 1989 and 1 February 1991, respectively. The authors invoked the allegedly discriminatory character of article 116 (6) of the National Service Code (Code du service national), pursuant to which conscientious objectors were required to perform civilian national service duties for a period of 24 months, whereas military service did not exceed 12 months.

2.2 The authors were charged before the Criminal Court (Tribunal Correctionnel) of Paris and the Criminal Court of Orléans, respectively, with desertion in peacetime, pursuant to articles 398 and 399 of the Code of Military Justice. On 4 July 1991, the Criminal Court of Paris found Mr. Nicolas guilty as charged and sentenced him to one year's imprisonment; on 17 June 1992 the Criminal Court of Orléans found Mr. Venier also guilty and sentenced him to 10 months' imprisonment, rejecting the arguments of the defence, which had invoked articles 9, 10 and 14 of the European Convention on Human Rights and articles 18 and 19 of the Covenant.

2.3 On appeal by Mr. Nicolas, the Paris Court of Appeal confirmed the guilty verdict but modified the sentence into a two months' suspended prison sentence. On 8 February 1993, the Court of Appeal of Orléans confirmed the Criminal Court's decision concerning Mr. Venier but reduced the sentence to eight months' imprisonment (of which six months were suspended). On 14 December 1994, the Court of Cassation rejected the authors' further appeals, holding that article 116 (6) of the National Service Code was not discriminatory and did not violate articles 9, 10 and 14 of the European Convention on Human Rights. With that latter decision, all available remedies are said to have been exhausted.

The complaints

3.1 According to the authors, both article 116 (6) of the National Service Code (in its version of July 1983 prescribing a period of 24 months of civilian service for conscientious objectors) and article L.2 of the National Service Code in its version of January 1992 (as amended by Act No. 92n9 of 4 January 1992), which sets the duration of civilian service for conscientious objectors at 20 months, violates articles 18, 19 and 26, juncto article 8 of the Covenant in that they double the duration of service for conscientious objectors in comparison with that for persons performing military service.

3.2 The authors acknowledge that in case No. 295/1988[1] the Committee has held that an extended period of alternative service was neither unreasonable nor punitive, and has found no violation of the Covenant. However, they invoke and quote at length from the individual opinions appended to the Committee's Views by three of its members, who had concluded that the challenged legislation was not based on either reasonable or objective criteria, such as a more severe type of service or the need for special training to perform the longer service. The authors fully endorse the conclusions of those three members of the Committee.

3.3 The authors observe that under articles L.116 (2) to L.116 (4) of the National Service Code, each application for recognition as a conscientious objector has to be approved by the Minister for the Armed Forces. If he refuses, an appeal to the Administrative Tribunal is possible under article L.116 (3). In such circumstances, the authors argue, it cannot be assumed that the length of civilian service was fixed purely for reasons of administrative convenience, since anyone agreeing to perform civilian service twice as long as military service should be deemed to have genuine convictions. Rather, the length of civilian service must be deemed to have a punitive character, which is not based on reasonable or objective criteria.

3.4 In support of their contention, the authors invoke a judgement of the Italian Constitutional Court of July 1989, which held that the provision for non-military service lasting eight months longer than military service was incompatible with the Italian Constitution. They further point to a decision adopted by the European Parliament in 1967 which, on the basis of article 9 of the European Convention on Human Rights, suggested that the duration of alternative service should be the same as that of military service. Moreover, the Committee of Ministers of the Council of Europe has declared that alternative service must not have a punitive character and that its duration, in relation to military service, must remain within reasonable limits (Recommendation No. R(87)8 of 9 April 1987). Finally, the authors note that the United Nations Commission on Human Rights declared, in a resolution adopted on 5 March 1987,[2] that conscientious objection to military service should be regarded as a legitimate exercise of the right to freedom of thought, conscience and religion, as recognized by the Covenant.

3.5 In these circumstances, the authors submit that requiring them to perform civilian service that is twice as long as military service constitutes unlawful and prohibited discrimination on the basis of opinion, and that the possibility of imprisonment for refusal to perform civilian service beyond the length of time of military service constitutes a violation of articles 18, paragraph 2, 19, paragraph 1, and 26 of the Covenant.

The State party's observations on admissibility and the authors' comments thereon

4.1 The State party contends firstly that the communications are incompatible ratione materiae with the provisions of the Covenant since, on the one hand, the Committee has acknowledged in its decision on communication No. 185/1984 (L.T.K. v. Finland) that "the Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of article 8, can be construed as to imply that right" and since, on the other hand, by virtue of article 8, paragraph 3 (c) (ii) of the Covenant, the internal regulation of national service, and therefore of conscientious objector status for those States which recognize it, does not fall within the scope of the Covenant and remains a matter for domestic legislation.

4.2 Subsidiarily, the State party contends that domestic remedies have not been exhausted by the authors. In this connection, it submits that the authors of the communications have exhausted the judicial remedies open to them, but have not exhausted all administrative remedies. The argument put forward in this connection is that, by leaving their duty stations before having received replies from the military authorities concerning their requests for a reduction in the

length of their service, the authors violated the provisions of the National Service Code, thus becoming liable to criminal prosecution, and did not wait for the military authorities to refuse their requests and then bring the matter before the Administrative Tribunal.

4.3 Third and last, the State party contends that the authors do not qualify as victims of a violation of articles 18, paragraph 2, 19, paragraph 1, and 26 of the Covenant. With regard to articles 18 and 19 of the Covenant, the State party claims that by recognizing conscientious objector status and offering conscripts a choice as to the form of their national service, it allows them to opt freely for the national service appropriate to their beliefs, thus enabling them to exercise their rights under articles 18 and 19 of the Covenant. In this connection, the State party concludes, quoting the decision on communication No. 185/1984 cited above, that as the authors were "not prosecuted and sentenced because of [their] beliefs or opinions as such, but because [they] refused to perform military service", they cannot therefore claim to be victims of a violation of articles 18 and 19 of the Covenant.

4.4 With regard to the alleged violation of article 26 of the Covenant, the State party, noting that the authors complain of a violation of this article because the length of alternative civilian service is double that of military service, submits first of all that "the Covenant, while prohibiting discrimination and guaranteeing equal protection of the law to everyone, does not prohibit all differences of treatment", which must be "based on reasonable and objective criteria" (communication No. 196/1985, Gueye v. France). The State party argues in this connection that the situation of conscripts performing alternative civilian service differs from that of those performing military service, notably in respect of the heavier constraints of service in the army, and that a longer period of alternative civilian service constitutes a test of the sincerity of conscientious objectors, designed to prevent conscripts from claiming conscientious objector status for reasons of comfort, ease and security. The State party also quotes the Committee's Views on communication No. 295/1988 (Järvinen v. Finland), where the Committee held that the 16-month period of alternative service imposed for conscientious objectors - double the eight-month period of military service - was "neither unreasonable nor punitive". The State party therefore concludes that the difference of treatment complained of by the authors is based on the principle of equality, which requires different treatment of different situations.

4.5 For all of these reasons, the State party requests the Committee to declare the communications inadmissible.

5.1 Concerning the State party's first argument as to the Committee's competence ratione materiae, the authors cite the Committee's General Comment No. 22 (48), where it is stated that the right to conscientious objection "can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service". According to the authors, it is clear from these comments that the Committee is competent to determine whether or not there has been a violation of the right to conscientious objection under article 18 of the Covenant.

5.2 The authors claim that the problem posed in their case lies not in a possible infringement of conscientious objectors' freedom of belief by French legislation, but in the conditions for the exercise of that freedom, since alternative civilian service is twice the length of military service, without this being justified by any provision to protect public order, in violation of article 18, paragraph 3, of the Covenant. The authors invoke in this context the Committee's General Comment No. 22 (48), which states that "limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. (...) Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner", and conclude that requiring conscientious objectors to perform alternative civilian service which is twice the length of military service constitutes a discriminatory restriction on the enjoyment of the rights set forth in article 18 of the Covenant.

5.3 As to the question of the exhaustion of domestic remedies, the authors state that domestic remedies in respect of the criminal proceedings brought against them have, in fact, been exhausted since the Court of Cassation dismissed their appeals against the Court of Appeal judgements on 14 December 1994. With regard to the non-exhaustion of administrative remedies, the authors maintain that such remedies were not open to them inasmuch as, not having been notified of any administrative decision, they could not bring the matter before the Administrative Tribunal.

5.4 Concerning the alleged violation of article 26, the authors claim that requiring a period of civilian service twice the length of military service constitutes a difference of treatment which is not based on "reasonable and objective criteria" and therefore constitutes discrimination prohibited by the Covenant (communication No. 196/1985 cited above). In support of this conclusion, the authors argue that there is no justification for making civilian service twice the length of military service, in fact, unlike in the Järvinen case (communication No. 295/1988 cited above), the longer duration is not justified by any relaxation of the administrative procedures for obtaining conscientious objector status since, under articles L.116 (2) and L.116 (4) of the National Service Code, applications for conscientious objector status are subject to approval by the Minister for the Armed Forces following an examination which may result in refusal. Nor is it justified in the general interest or as a test of the seriousness and sincerity of the beliefs of the conscientious objector. Indeed, the mere fact of taking special steps to test the sincerity and seriousness of the beliefs of conscientious objectors in itself constitutes discrimination based on the recognition of a difference of treatment between conscripts. Furthermore, conscientious objectors derive no benefit or privilege from their status - unlike, for example, persons assigned to perform international cooperation services instead of military service, who have the opportunity to work abroad in a professional field corresponding to their university qualifications for 16 months (i.e. four months less than the civilian service for conscientious objectors) - and a difference of treatment is not, therefore, justified on that ground.

The Committee's decision on admissibility

6.1 At its sixtieth session, the Committee decided to join the consideration of communications Nos. 690/1996 and 691/1996. It then proceeded to consider the admissibility of the communications.

6.2 Concerning the requirement of exhaustion of available domestic remedies, the Committee took note of the fact that the authors had exhausted all the judicial remedies that were open to them. The Committee also considered that administrative remedies were not available to the authors of the communications. The Committee therefore concluded that it was not prevented by article 5, paragraph 2 (b), of the Optional Protocol from dealing with the communications.

6.3 The Committee took note of the State party's arguments concerning the incompatibility of the communications ratione materiae with the provisions of the Covenant. In this regard, the Committee considered that the matter raised in the communications did not concern a violation of the right to conscientious objection as such. The Committee considered that the authors had sufficiently substantiated their claim, for the purposes of admissibility, that the communications might raise issues under provisions of the Covenant.

7. Accordingly, on 11 July 1997, the Committee decided that the communications were admissible.

The State party's observations on the merits of the communication

8.1 By submission of 18 June 1998, the State party argues that the communication should be rejected because the authors are not victims of a violation of the Covenant, and because their complaints are ill-founded.

8.2 According to the State party, article L.116 of the National Service Code in its version of July 1983 instituted a genuine right to conscientious objection, in the sense that the sincerity of the objections is said to be shown by the request alone, if presented in accordance with the legal requirements (that is, justified by an affirmation of the applicant that he has personal objections to using weapons). No verification of the objections took place. To be admissible, requests had to be presented on the 15th of the month preceding the incorporation into the military service. Thus a request could only be rejected if it was not justified or if it was not presented in time. A right to appeal existed to the administrative tribunal.

8.3 Although the normal length of military service since January 1992 in France was 10 months, some forms of national service lasted 12 months (military service of scientists) and 16 months (civil service of technical assistance). The length of the service for conscientious objectors was 20 months. The State party denies that the length has a punitive or discriminatory character. It is said to be the only way to verify the seriousness of the objections, since the objections are no longer tested by the administration. After having fulfilled their service, conscientious objectors have the same rights as those who have finished civil national service.

8.4 The State party informs the Committee that on 28 October 1997 a law was adopted to reform the national service. Under this law, all young men and women will have to participate between their 16th and 18th birthday in a one day call-up to prepare for defence. Optional voluntary service can be done for a duration of 12 months, renewable up to 60 months. The new law is applicable to men born after 31 December 1978 and women born after 31 December 1982.

8.5 According to the State party, its system of conscientious objection was in accordance with the requirements of articles 18, 19 and 26 of the Covenant, and with the Committee's general comment No. 22. The State party notes that its regime for conscientious objection did not make any difference on the basis of belief, and no process of verification of the justification forwarded by the applicants occurred, other than in many neighbouring countries. No discrimination existed against conscientious objectors, as their service was a recognised form of the national service, on equal footing with military service or other forms of civil service. In 1997, just under 50 per cent of those performing civil service were doing this on the basis of conscientious objections to military service.

8.6 The State party submits that the authors of the present communications have not been victims of discrimination on the basis of their choice to perform national service as a conscientious objector. It notes that they were convicted for not complying with their obligations under the civil service, which they had freely chosen. Their convictions were thus not because of their personal beliefs, nor on the basis of their choice for alternative civil service, but on the basis of their refusal to respect the conditions of that type of service. The State party notes that at the time when the authors requested to perform alternative military service, they had not indicated any objection to the length of service. Moreover, in the case of Mr. Venier, the State party notes that the reason which he gave for abandoning his civil service, was "the attitude of his country towards the Third World", and thus unrelated to the alleged discriminatory character of the length of service for conscientious objectors. In this context, the State party notes that it would have been open to the authors to choose another form of unarmed national service, such as one of technical assistance. On this basis, the State party argues that the authors have not established that they are victims of a violation by the State party.

8.7 Subsidiarily, the State party argues that the authors' claims are ill-founded. In this context, the State party recalls that according to the Committee's own jurisprudence, not all differences in treatment constitute discrimination, as long as they are based on reasonable and objective criteria. In this context, the State party refers to the Committee's Views in case No. 295/1988 (Jarvinen v. Finland), where the service for conscientious objectors was 16 months and that for other conscripts 8 months, but the Committee found that no violation of the Covenant had occurred because the length of the service ensured that those applying for conscientious objector status would be serious, since no further verification of the objections occurred. The State party submits that the same reasoning should apply to the present cases.

8.8 In this context, the State party also notes that the conditions of the alternative civil service were less onerous than that of military service. The conscientious objectors had a wide choice of posts. They could also propose their own employer and could do their service within their professional interest. They also received a higher indemnity than those serving in the armed forces. In this context, the State party rejects counsel's claim that the persons performing international cooperation service received privileged treatment vis à vis conscientious objectors, and submits that those performing international cooperation service did so in often very difficult situations in a foreign country, whereas the conscientious objectors performed their service in France. In the case of Mr. Venier, he performed his civil service with the secretariat of the "Movement for a non-violent alternative", whereas Mr. Nicolas was posted with the international civil service in Ile de France.

8.9 The State party concludes that the length of service for the authors of the present communications had no discriminatory character compared with other forms of civil service or military service. The differences that existed in the length of the service were reasonable and reflected objective differences between the types of service. Moreover, the State party submits that in most European countries the time of service for conscientious objectors is longer than military service.

Counsel's comments on the State party's submission

9.1 In his comments, dated 21 December 1998, counsel submits that at issue are the modalities of civil service for conscientious objectors. He submits that the double length of this service was not justified by any reason of public order and refers in this context to paragraph 3 of article 18 of the Covenant which provides that the right to manifest one's religion or beliefs may be subject only to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. He also refers to the Committee's general comment No. 22 where the Committee stated that restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. He argues that the imposition upon conscientious objectors of civil service of double length as that of the military service constitutes a discriminatory restriction, because the manifestation of a conviction such as the refusal to carry arms, does not in itself affect the public safety, order, health, or morals or the fundamental rights and freedoms of others since the law expressly recognizes the right to conscientious objection.

9.2 Counsel states that, contrary to what the State party has submitted, persons who requested status as a conscientious objector were subject to administrative verification and did not have a choice as to the conditions of service. In this context, counsel refers to the legal requirements that a request had to be submitted before the 15th of the month of incorporation into the military service, and that it had to be reasoned. Thus, the Minister for the Armed Forces might refuse a request and no automatic right to conscientious objector status existed. According to counsel, it is therefore clear that the reasons given by the conscientious objector were being tested.

9.3 Counsel rejects the State party's argument that the authors had made an informed choice as to the kind of service they were going to perform. Counsel emphasizes that they made their choice on the basis of their convictions, not on the basis of the length of service. They had no choice in the modalities of the service. Counsel argues that no reasons of public order exist to justify that the length of civil service for conscientious objectors be twice the length of military service.

9.4 Counsel maintains that the length of service constitutes discrimination on the basis of opinion. Referring to the Committee's Views in communication No. 295/1988 (Järvinen v. Finland), counsel submits that the present case is to be distinguished, since in the earlier case the extra length of service was justified, in the opinion of the majority in the Committee, by the absence of administrative formalities in having the status of conscientious objector recognized.

9.5 As far as other forms of civil service are concerned, especially those doing international cooperation service, counsel rejects the State party's argument that these were often performed in difficult conditions and on the contrary, asserts that this service was often fulfilled in another

European country and under pleasant conditions. Those performing the service moreover built up a professional experience. According to counsel, the conscientious objector did not draw any benefit from his service. As regards the State party's argument that the extra length of service is a test for the seriousness of a person's objections, counsel argues that to test the seriousness of conscientious objectors constitutes in itself a flagrant discrimination, since those who applied for another form of civil service were not being subjected to a test of their sincerity. With regard to the advantages mentioned by the State party (such as no obligation to carry a uniform, not being under military discipline), counsel notes that the same advantages were being enjoyed by those performing other kinds of civil service and that these did not exceed 16 months. With regard to the State party's argument that the conscientious objectors received a higher pay than those performing military service, counsel notes that they worked in structures where they were treated as employees and that it was thus normal that they would receive a certain remuneration. He states that the pay was little in comparison with the work done and much less than that received by normal employees. According to counsel, those performing cooperation service were better paid.

Issues and proceedings before the Committee

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

10.2 The Committee has noted the State party's argument that the authors are not victims of any violation, because they were not convicted for their personal beliefs, but for deserting the service freely chosen by them. The Committee notes, however, that during the proceedings before the courts, the authors raised the right to equality of treatment between conscientious objectors and military conscripts as a defence justifying their desertion and that the courts' decisions refer to such claim. It also notes that the authors contend that, as conscientious objectors to military service, they had no free choice in the service that they had to perform. The Committee therefore considers that the authors qualify as victims for purposes of the Optional Protocol.

10.4 The issue before the Committee is whether the specific conditions under which alternative service had to be performed by the authors constitute a violation of the Covenant.[3] The Committee observes that under article 8 of the Covenant, States parties may require service of a military character and, in case of conscientious objection, alternative national service, provided that such service is not discriminatory. The authors have claimed that the requirement, under French law, of a length of 24 months for national alternative service, rather than 12 months for military service, is discriminatory and violates the principle of equality before the law and equal protection of the law set forth in article 26 of the Covenant. The Committee reiterates its position that article 26 does not prohibit all differences of treatment. Any differentiation, as the Committee has had the opportunity to state repeatedly, must however be based on reasonable and objective criteria. In this context, the Committee recognizes that the law and practice may establish differences between military and national alternative service and that such differences may, in a particular case, justify a longer period of service, provided that the differentiation is based on reasonable and objective criteria, such as the nature of the specific service concerned or the need for a special training in order to accomplish that service. In the

present case, however, the reasons forwarded by the State party do not refer to such criteria or refer to criteria in general terms without specific reference to the authors' cases, and are rather based on the argument that doubling the length of service was the only way to test the sincerity of an individual's convictions. In the Committee's view, such argument does not satisfy the requirement that the difference in treatment involved in the present cases was based on reasonable and objective criteria. In the circumstances, the Committee finds that a violation of article 26 occurred, since the authors were discriminated against on the basis of their conviction of conscience.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. The Human Rights Committee notes with satisfaction that the State party has changed the law so that similar violations will no longer occur in the future. In the circumstances of the present case, the Committee considers that the finding of a violation constitutes sufficient remedy for the authors.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Järvinen v. Finland, Views adopted on 25 July 1990, paras. 6.4 to 6.6.

[2] E/CN.4/1987/L.73 dated 5 March 1987.

[3] See also the Committee's Views in case No. 666/1995, Foin v. France, CCPR/C/67/D/666/1995.

APPENDIX

Individual opinion by Nisuke Ando, Eckart Klein, David Kretzmer and Abdallah Zakhia (dissenting)

We dissent from the Committee's Views for the same reasons we have laid down in our separate dissenting opinion on the Foin case (Communication No. 666/1995).

(Signed) N. Ando

(Signed) E. Klein

(Signed) D. Kretzmer

(Signed) A. Zakhia

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

H. Communication No. 694/1996, Waldman v. Canada
(Views adopted on 3 November 1999, sixty-seventh session)*

Submitted by:	Arieh Hollis Waldman (Initially represented by Mr. Raj Anand)
Alleged victim:	The author
State party:	Canada
Date of communication:	29 February 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1999,

Having concluded its consideration of communication No. 694/1996 submitted to the Human Rights Committee on behalf of Arieh Hollis Waldman, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Arieh Hollis Waldman, a Canadian citizen residing in the province of Ontario. He claims to be a victim of a violation of articles 26, and articles 18(1), 18(4) and 27 taken in conjunction with article 2(1).**

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure Mr. Maxwell Yalden did not participate in the examination of the case. The text of an individual opinion by member Martin Scheinin is appended to this document.

** The author was represented by Mr. Raj Anand from Scott and Aylen, a law firm in Toronto, Ontario, until 1998.

1.2 The author is a father of two school-age children and a member of the Jewish faith who enrols his children in a private Jewish day school. In the province of Ontario Roman Catholic schools are the only non-secular schools receiving full and direct public funding. Other religious schools must fund through private sources, including the charging of tuition fees.

1.3 In 1994 Mr. Waldman paid $14,050 in tuition fees for his children to attend Bialik Hebrew Day School in Toronto, Ontario. This amount was reduced by a federal tax credit system to $10,810.89. These tuition fees were paid out of a net household income of $73,367.26. In addition, the author is required to pay local property taxes to fund a public school system he does not use.

The facts

2.1 The Ontario public school system offers free education to all Ontario residents without discrimination on the basis of religion or on any other ground. Public schools may not engage in any religious indoctrination. Individuals enjoy the freedom to establish private schools and to send their children to these schools instead of the public schools. The only statutory requirement for opening a private school in Ontario is the submission of a "notice of intention to operate a private school". Ontario private schools are neither licensed nor do they require any prior Government approval. As of 30 September 1989, there were 64,699 students attending 494 private schools in Ontario. Enrolment in private schools represents 3.3 percent of the total day school enrolment in Ontario.

2.2 The province of Ontario's system of separate school funding originates with provisions in Canada's 1867 constitution. In 1867 Catholics represented 17 per cent of the population of Ontario, while Protestants represented 82 per cent. All other religions combined represented 2 per cent of the population. At the time of Confederation it was a matter of concern that the new province of Ontario would be controlled by a Protestant majority that might exercise its power over education to take away the rights of its Roman Catholic minority. The solution was to guarantee their rights to denominational education, and to define those rights by referring to the state of the law at the time of Confederation.

2.3 As a consequence, the 1867 Canadian constitution contains explicit guarantees of denominational school rights in section 93. Section 93 of the Constitution Act, 1867 grants each province in Canada exclusive jurisdiction to enact laws regarding education, limited only by the denominational school rights granted in 1867. In Ontario, the section 93 power is exercised through the Education Act. Under the Education Act every separate school is entitled to full public funding. Separate schools are defined as Roman Catholic schools. The Education Act states: "1. (1) 'separate school board' means a board that operates a school board for Roman Catholics, ... 122. (1) Every separate school shall share in the legislative grants in like manner as a public school". As a result, Roman Catholic schools are the only religious schools entitled to the same public funding as the public secular schools.

2.4 The Roman Catholic separate school system is not a private school system. Like the public school system it is funded through a publicly accountable, democratically elected board of education. Separate School Boards are elected by Roman Catholic ratepayers, and these school boards have the right to manage the denominational aspects of the separate schools. Unlike

private schools, Roman Catholic separate schools are subject to all Ministry guidelines and regulations. Neither s.93 of the Constitution Act 1867 nor the Education Act provide for public funding to Roman Catholic private/independent schools. Ten private/independent Roman Catholic schools operate in Ontario and these schools receive no direct public financial support.

2.5 Private religious schools in Ontario receive financial aid in the form of (1) exemption from property taxes on non-profit private schools; (2) income tax deductions for tuition attributable to religious instruction; and (3) income tax deductions for charitable purposes. A 1985 report concluded that the level of public aid to Ontario private schools amounted to about one-sixth of the average total in cost per pupil enrolled in a private school. There is no province in Canada in which private schools receive funding on an equal basis to public schools. Direct funding of private schools ranges from 0 per cent (Newfoundland, New Brunswick, Ontario) to 75 per cent (Alberta).

2.6 The issue of public funding for non-Catholic religious schools in Ontario has been the subject of domestic litigation since 1978. The first case, brought 8 February 1978, sought to make religious instruction mandatory in specific schools, thereby integrating existing Hebrew schools into public schools. On 3 April 1978, affirmed 9 April 1979, Ontario courts found that mandatory religious instruction in public schools was not permitted.

2.7 In 1982 Canada's constitution was amended to include a Charter of Rights and Freedoms which contained an equality rights provision. In 1985 the Ontario government decided to amend the Education Act to extend public funding of Roman Catholic schools to include grades 11 to 13. Roman Catholic schools had been fully funded from kindergarten to grade 10 since the mid-1800s. The issue of the constitutionality of this law (Bill 30) in view of the Canadian Charter of Rights and Freedoms, was referred by the Ontario government to the Ontario Court of Appeal in 1985.

2.8 On 25 June 1987 in the Bill 30 case the Supreme Court of Canada upheld the constitutionality of the legislation which extended full funding to Roman Catholic schools. The majority opinion reasoned that section 93 of the Constitution Act 1867 and all the rights and privileges it afforded were immune from Charter scrutiny. Madam Justice Wilson, writing the majority opinion stated: "It was never intended ... that the Charter could be used to invalidate other provisions of the constitution, particularly a provision such as s.93 which represented a fundamental part of the Confederation compromise."

2.9 At the same time the Supreme Court of Canada, in the majority opinion of Wilson, J. affirmed: "These educational rights, granted specifically to ... Roman Catholics in Ontario, make it impossible to treat all Canadians equally. The country was founded upon the recognition of special or unequal educational rights for specific religious groups in Ontario ...". In a concurring opinion in the Supreme Court, Estey J. conceded: "It is axiomatic (and many counsel before this court conceded the point) that if the Charter has any application to Bill 30, this Bill would be found discriminatory and in violation of ss. 2(a) and 15 of the Charter of Rights."

2.10 In a further case, Adler v. Ontario, individuals from the Calvinistic or Reformed Christian tradition, and members of the Sikh, Hindu, Muslim, and Jewish faiths challenged the constitutionality of Ontario's Education Act, claiming a violation of the Charter's provisions on

freedom of religion and equality. They argued that the Education Act, by requiring attendance at school, discriminated against those whose conscience or beliefs prevented them from sending their children to either the publicly funded secular or publicly funded Roman Catholic schools, because of the high costs associated with their children's religious education. A declaration was also sought stating that the applicants were entitled to funding equivalent to that of public and Roman Catholic schools. The Ontario Court of Appeal determined that the crux of Adler was an attempt to revisit the issue which the Supreme Court of Canada had already disposed of in the Bill 30 case. Chief Justice Dubin stated that the Bill 30 case was "really quite decisive of the discrimination issue in these appeals". They also rejected the argument based on freedom of religion.

2.11 On appeal, the Supreme Court of Canada by judgement of 21 November 1996, confirmed that its decision in the Bill 30 case was determinative in the Adler litigation, and found that the funding of Roman Catholic separate schools could not give rise to an infringement of the Charter because the province of Ontario was constitutionally obligated to provide such funding.

The complaint

3.1 The author contends that the legislative grant of power to fund Roman Catholic schools authorized by section 93 of the Constitution Act of Canada 1867, and carried out under sections 122 and 128 of the Education Act (Ontario) violates Article 26 of the Covenant. The author states that these provisions create a distinction or preference which is based on religion and which has the effect of impairing the enjoyment or exercise by all persons, on an equal footing, of their religious rights and freedoms. He argues that the conferral of a benefit on a single religious group cannot be sustained. When a right to publicly financed religious education is recognized by a State party, no differentiation should be made among individuals on the basis of the nature of their particular beliefs. The author maintains that the provision of full funding exclusively to Roman Catholic schools cannot be considered reasonable. The historical rationale for the Ontario government's discriminatory funding practice, that of protection of Roman Catholic minority rights from the Protestant majority, has now disappeared, and if anything has been transferred to other minority religious communities in Ontario.[1] It is also unreasonable in view of the fact that other Canadian provinces and territories do not discriminate on the basis of religion in allocating education funding.

3.2 The author also claims that Ontario's school funding practices violate Article 18(1) taken in conjunction with Article 2. The author states that he experiences financial hardship in order to provide his children with a Jewish education, a hardship which is not experienced by a Roman Catholic parent seeking to provide his children with a Roman Catholic education. The author claims that such hardship significantly impairs, in a discriminatory fashion, the enjoyment of the right to manifest one's religion, including the freedom to provide a religious education for one's children, or to establish religious schools.

3.3 The author further points out that this violation is not sustainable under the limitation provisions of article 18(3), which only permits those limitations which are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedom of others. According to the author, a limitation established to protect morals may not be based on a single tradition.

3.4 The author further asserts that when a right to publicly financed religious education is recognized by a State party, no differentiation should be made on the basis of religion. The full and direct public funding of Roman Catholic schools in Ontario does not equally respect the liberty of non-Roman Catholics to choose an education in conformity with a parent's religious convictions, contrary to Article 18(4) taken together with Article 2.

3.5 The author states that Article 27 recognizes that separate school systems are crucial to the practice of religion, that these schools form an essential link in preserving community identity and the survival of minority religious groups and that positive action may be required to ensure that the rights of religious minorities are protected. Since Roman Catholics are the only religious minority to receive full and direct funding for religious education from the government of Ontario, Article 27 has not been applied, as required by Article 2, without distinction on the basis of religion.

State party's observations

4.1 By note of 29 April 1997, the State party agrees to the combined consideration of admissibility and merits of the communication by the Committee.

4.2 In its submission of February 1998, the State party denies that the facts of the case disclose violations of articles 2, 18, 26 and 17 of the Covenant.

4.3.1 With regard to the alleged violation of article 26, the State party contends the communication is inadmissible ratione materiae, or, in the alternative, does not constitute a violation. The State party recalls that a differentiation in treatment based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26. It refers to the Committee's jurisprudence in communication No. 191/1985,[2] where the Committee found that the State party was not violating article 26 by not providing the same level of subsidy for private and public education, when the private system was not subject to State supervision. It also refers to the Committee's Views in communications Nos. 298/1988 and 299/1988,[3] where the Committee decided that the State party could not be deemed to be under an obligation to provide the same benefits to private schools as to public schools, and that the preferential treatment given to public sector schooling was reasonable and based on objective criteria. The Committee also considered that the State party could not be deemed to discriminate against parents who freely choose not to avail themselves of benefits which are generally open to all.

4.3.2 The State party argues that its funding of public schools but not private schools is not discriminatory. All children of every or no religious denomination have the same right to attend free secular public schools maintained with tax funds. According to the State party, it is not a deprivation by the Government that a child or a parent voluntarily chooses to forego the exercise of the right to educational benefits provided in the public school system. The State party emphasizes that the province of Ontario does not fund any private schools, whether they are religious or not. The distinction made in the funding of schools is based not on religion, but on whether or not the school is a public or a private/independent institution.

4.3.3 According to the State party, the establishment of secular public institutions is consistent with the values of article 26 of the Covenant. Secular institutions do not discriminate against religion, they are a legitimate form of Government neutrality. According to the State party, a secular system is a tool which assists in preventing discrimination among citizens on the basis of their religious faiths. The State party makes no distinctions among different religious groups in its public education and does not limit any religious group's ability to establish private schools.

4.3.4 Apart from its obligations under the Constitution Act 1867, the State party provides no direct funding to religious schools. In such circumstances, the State party argues that it is not discriminatory to refuse funding for religious schools. In making its decision, the State party seeks to achieve the very values advanced by article 26, the creation of a tolerant society where there is respect and equality for all religious beliefs. The State party argues that it would defeat the purposes of article 26 itself if the Committee was to hold that because of the provisions in the Constitution Act 1867 requiring the funding of Roman Catholic schools, the State party now must fund all private religious schools, thus undermining its very ability to create and promote a tolerant society that truly protects religious freedom, when in the absence if the 1867 constitutional provision, it would have no obligation under the Covenant to fund any religious schools at all.

4.4.1 In relation to article 18, the State party refers to the travaux préparatoires which make it clear that article 18 does not include the right to require the State to fund private religious schools. During the drafting the question was expressly raised and answered in the negative.[4] As a consequence, the State party argues that the author's claim under article 18 is inadmissible ratione materiae. In the alternative, the State party argues that its policy meets the guarantee of freedom of religion contained in article 18, because it provides a public school system which is open to persons of all religious beliefs and which does not provide instruction in a particular religion or belief, and because there is freedom to establish private religious schools and parents are free to send their children to such religious schools. The State party denies that paragraph 4 of article 18 obligates States to subsidize private religious schools or religious education.[5] According to the State party, the purpose of article 18 is to ensure that religious observance, beliefs and practices remain a private matter, free from State coercion or restraint. It is the State's obligation to provide an education open and accessible to all children regardless of religion. There is no obligation to either offer or finance religious instruction or indoctrination. While the province must ensure that religious freedom and religious differences are accommodated within the public school system, it has no obligation to fund individuals who, for religious reasons, exercise their freedom to opt out of the public school system.

4.4.2 The State party argues that failure to act in order to facilitate the practice of religion cannot be considered State interference with freedom of religion. It points out that there are many spheres of government action which hold religious significance for religious believers and the State party rejects the suggestion that it must pay for religious dimensions in spheres in which it takes a role, such as religious marriages and religious community institutions such as churches and hospitals.

4.4.3 In the alternative, if the Committee were to interpret article 18 as requiring States to fund religious schools, the State party argues that its limitation meets the requirements of paragraph 3 of article 18 as it is prescribed by law and is necessary to protect public order and the

fundamental rights and freedoms of others. The objectives of the State party's education system are the provision of a tuition-free, secular public education, universally accessible to all residents without discrimination and the establishment of a public education system which fosters and promotes the values of a pluralist, democratic society, including social cohesion, religious tolerance and understanding. The State party argues that if it were required to fund private religious schools, this would have a detrimental impact on the public schools and hence the fostering of a tolerant, multicultural, non-discriminatory society in the province.

4.4.4 Public schools, in the State party's opinion, are a rational means of fostering social cohesion and respect for religious and other differences. Schools are better able to teach common understanding and shared values if they are less homogeneous. The State party submits that one of the strengths of a public system of education is that it provides a venue where people of all colours, races, national and ethnic origins, and religions interact and try to come to terms with one another's differences. In this way, the public schools build social cohesion, tolerance and understanding. Extending public school funding rights to private religious schools will undermine this ability and may result in a significant increase in the number and kind of private schools. This would have an adverse effect on the viability of the public school system which would become the system serving students not found admissible by any other system. Such potential fragmentation of the school system is an expensive and debilitating structure for society. Moreover, extending public school funding rights to private religious schools could compound the problems of religious coercion and ostracism sometimes faced by minority religious groups in homogeneous rural areas of the province. The majority religious group could reintroduce and even make compulsory the practice of school prayer and religious indoctrination and minority religious groups would have to conform or attend their own, virtually segregated schools. To the extent that full funding of private schools enables such schools to supplant public schools, the government objective of universal access to education will be impaired. Full public funding of private religious schools is likely to lead to increased public school closings and to the reduction of the range of programs and services a public system can afford to offer.

4.4.5 The State party concludes that if the province of Ontario were required to fund private religious schools, this would have a detrimental impact on the public schools, and hence the fostering of a tolerant, multicultural, non-discriminatory society in the province, thus undermining the fundamental rights and freedoms of others. According to the State party it has struck the appropriate balance by funding a public school system where members of all groups can learn together while retaining the freedom of parents to send children to private religious schools, at their own expense, if they do desire.

4.5.1 As to the author's allegation that he is a victim of a violation of article 18 in conjunction with article 2 of the Covenant, the State party recalls that article 2 does not establish an independent right but is a general undertaking by States and cannot be invoked by individuals under the Optional Protocol without reference to other specific articles of the Covenant. It cannot be argued that article 2 in combination with article 18 has been violated if there is no such right in article 18 itself.

4.5.2 Alternatively, the State party rejects a violation of article 2 because a differentiation based on reasonable and objective criteria does not amount to a distinction or discrimination within the meaning of article 2 of the Covenant. For substantive arguments concerning the issue of discrimination, it refers to its arguments relating to the alleged violation of article 26.

4.6.1 In respect to the alleged violation of article 27, the State party contends that the communication is inadmissible ratione materiae or in the alternative does not demonstrate a violation. According to the State party, the travaux préparatoires make it clear that article 27 does not include a right to require the State to fund private religious schools. The article only protects against State actions of a negative character: individuals "shall not be denied the right". A proposal to include an obligation to take positive measures was defeated.[6] Although under article 27 a State party may be required to take certain positive actions, in the light of the intention of the drafters positive actions should be required only in rare circumstances. According to the State party, the province of Ontario has taken positive measures which protect the right of members of religious minorities to establish religious schools and to send their children to those schools. It is not further required to fund those schools.

4.6.2 In the alternative, restrictions on the rights contained in article 27 may occur where they have a reasonable and objective justification and are consistent with the provisions of the Covenant read as a whole. For the reasons given in relation to the creation of a tolerant society, Ontario's decision not to extend funding to all private religious schools meets this test for justification.

4.6.3 The State party refers to its arguments in relation to article 18 and reiterates that there can be no argument that article 27 in combination with article 2 has been violated if there is no such right in article 27 itself. In the alternative, there is no violation of article 2 because a differentiation based on reasonable and objective criteria does not amount to an invidious distinction or discrimination within the meaning of article 2. The State party refers to its arguments concerning article 26 above.

Author's comments

5.1 Counsel submits that the State party has admitted the discriminatory nature of the educational funding, and based this on a constitutional obligation. Counsel argues that article 26 of the Covenant does not allow exceptions for discriminatory constitutional laws and that historical anomalies cannot thwart the application of the equality provisions of the Covenant. Counsel rejects as circular the State party's argument that the difference between the funding of Roman Catholic schools and other religious schools is one between public and private schools. Counsel notes that the public quality of Roman Catholic schools is a bureaucratic construct assigned to one group of ratepayers based on their religious affiliation to the discriminatory exclusion of all other ratepayers.

5.2 Counsel rejects the State party's argument that the extension of non-discriminatory public funding to other religious schools would harm the goals of a tolerant, multi-cultural, non-discriminatory society, and argues that on the contrary, the current circumstance of discriminatory and selective funding of only one religious denomination in the establishment and

operation of religious schools is highly detrimental to fostering a tolerant, non-discriminatory society in the province and encourages the divided society among religious lines that it claims to defeat.

5.3 According to counsel, the State party's argument that the claim under article 18 is inadmissible ratione materiae because article 18 does not include a right to require the State to fund public schools, is a misrepresentation of the author's submissions. Counsel argues that article 18(1) includes the right to teach religion and the right to educate one's children in a religious school. If this is possible for some and not for others on discriminatory grounds, then article 18 is violated in conjunction with article 2. According to counsel, in order to give article 2 its full and proper meaning, it must have the effect of requiring non-discrimination on the listed grounds with respect to the rights and freedoms in the Covenant, even if in the absence of discrimination, no violation of the Covenant existed. If a violation of the Covenant was always required without the application or consideration of article 2, article 2 would be superfluous, in counsel's opinion.[7] Counsel clarifies that he does not claim a violation of article 18 on its own, but only in conjunction with article 2, because the funding of only Roman Catholic schools results in discriminatory support for Roman Catholic education.

5.4 According to counsel, the State party makes the same error in replying to his claims under article 27 in conjunction with article 2. He argues that, since Roman Catholic schools are the only religious minority to receive full and direct funding for religious education from the Government of Ontario, article 27 has not been applied, as required by article 2, without distinction on the basis of religion.

5.5 Counsel agrees with the State party that the fact alone that it does not provide the same level of funding for private as for public schools cannot be deemed to be discriminatory. He acknowledges that the public school system in Ontario would have greater resources if the Government would cease funding any religious schools. In the absence of discrimination, the withdrawal of such funding is a policy decision which is for the Government to take. Counsel notes that the amendment of the provision of the Canadian Constitution Act 1867 requires only the agreement of the Government of the province affected and the federal Government. Such amendments have been recently passed in Quebec and Newfoundland to reduce historical commitments to publicly-funded education for selective religious denominations.

5.6 Counsel maintains that when a right to publicly financed religious education is recognized by States parties, no differentiation shall be made among individuals on the basis of the nature of their particular beliefs. The practice of exclusively funding Roman Catholic religious education in Ontario therefore violates the Covenant. Counsel therefore seeks funding for all religious schools which meet provincial standards in Ontario at a level equivalent to the funding, if any, received by Roman Catholic schools in Ontario.

State party's further observations

6.1 In a further reply, the State party emphasizes that the recent constitutional amendments affecting education in Quebec and Newfoundland do not bring about the remedy sought by the author of equivalent funding for all religious schools. The changes in Quebec preserve the denominational status of Catholic and Protestant schools in that province, and protect that status

through an alternate constitutional means, by way of the notwithstanding clause in the Charter. The changes in Newfoundland demonstrate a clear rejection of the very remedy sought by the author, since it has replaced its religious based school system, where 8 different religions representing 90 per cent of the population each had the right to set up their own publicly funded schools, with a singular public system where religious observance will be permitted at the request of parents.

6.2 In respect of counsel's argument concerning article 2 of the Covenant, the State party rejects his suggestion that article 2 can convert laws or Government actions otherwise consistent with the rights and freedoms of the Covenant, into contraventions. In the State party's opinion, the author seeks to raise equality arguments by combining article 2 with articles 18 and 27 respectively. It is the equality guarantee in article 26 of the Covenant that is the proper context for raising such issues. The State party notes that article 26 has no equivalent in the European Convention for the Protection of Fundamental Human Rights and Fundamental Freedoms. The State party argues that a complainant who is unsuccessful under article 26 should not be entitled to an identical reexamination of the issue simply by combining article 2 with various substantive Covenant provisions.

6.3 The State party further observes that article 2 of the Covenant requires the State to respect and ensure to all individuals within its territory the rights recognized in the present Covenant. The funding of denominational separate schools in Ontario is not required to ensure the rights contained in articles 18 and 27 of the Covenant, neither is it related to, or in addition to, the obligations created by those articles. The funding arises solely out of the constitutional obligation under section 93(1) of the Constitution Act 1867, not out of any obligation under, in conformity with, nor the augmenting of any right in any of the articles of the Covenant.

Author's further comments

7 By submission of 15 March 1999, the author notes that the State party's rationale for the discriminatory treatment of religious schools, the desire to foster multiracial and multicultural harmony through maximizing public funding for the secular school system, would actually require the withdrawal of special funding for Roman Catholic separate schools. He further points out that the fact that Quebec had to resort to the notwithstanding clause in the Charter in order to preserve its funding for separate schools indicates that this system is in violation of the equality rights contained in the Charter, and by consequence of article 26 of the Covenant. The author refers to the constitutional changes in respect of the education system in Newfoundland and states that it is indicative of the fact that constitutional change in relation to denominational schools is possible even over the objections of those with vested interests.

State party's further observations

8.1 In a further reply to the author's comments, the State party contests the author's interpretation of the use of the notwithstanding clause in Quebec. According to the State party, the amendment to section 93 of the Constitution Act, 1867, took away the constitutional protection for Protestant and Catholic denominational schools in Quebec in order to replace them with linguistic school boards. Continued constitutional protection for the denominational

schools, however, is provided through the alternate method of the notwithstanding clause. According to the State party, this shows that the issue of denominational school funding continues to involve the present day complex balancing of diverse needs and interests.

8.2 The State party notes that in his comments, the author for the first time indicates that a possible remedy for the alleged discrimination would be the elimination of funding for the Roman Catholic separate schools. So far, the State party's reply to the author's communication has focussed on his claim that the failure to extend funding constituted a violation of the Covenant, not on a claim that the failure to eliminate funding from the Roman Catholic separate school system is violative of the Covenant. The State party notes that in another communication (No. 816/1998, Tadman et al. v. Canada) presented to the Committee under the Optional Protocol this question has been addressed and therefore it requests the Committee to consider jointly the two communications.

8.3 In case the Committee does not join the consideration of the two communications, the State party provides further arguments concerning this matter. In this context, the State party explains that without the protection of the rights of the Roman Catholic minority, the founding of Canada would not have been possible and that the separate school system remained a controversial issue, at times endangering the national unity in Canada. The State party explains that the funding is seen by the Roman Catholic community as correction of a historical wrong.

8.4 The State party submits that there are reasonable and objective grounds for not eliminating funding to Roman Catholic separate schools in Ontario. The elimination would be perceived as undoing the bargain made at Confederation to protect the interests of a vulnerable minority in the province and would be met with outrage and resistance by the Roman Catholic community. It would also result in a certain degree of economic turmoil, including claims for compensation of facilities or lands provided for Roman Catholic schools. Further, the protection of minority rights, including minority religion and education rights, is a principle underlying the Canadian constitutional order and militates against elimination of funding for the Roman Catholic separate schools. Elimination of funding for separate schools in Ontario would further lead to pressure on other Canadian provinces to eliminate their protections for minorities within their border.

Issues and proceedings before the Committee

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

9.2 The Committee notes that the State party has challenged the admissibility of the communication ratione materiae. The Committee, however, considers that the author's claim of discrimination, in itself and in conjunction with articles 18 and 27, is not incompatible with the provisions of the Covenant. The State party has not raised any other objections and accordingly the Committee finds the communication admissible. The Committee does not consider that there would be any difficulty or disadvantage to the parties in proceeding to consider this case on its own without joinder as requested by the State party.

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The issue before the Committee is whether public funding for Roman Catholic schools, but not for schools of the author's religion, which results in him having to meet the full cost of education in a religious school, constitutes a violation of the author's rights under the Covenant.

10.3 The State party has argued that no discrimination has occurred, since the distinction is based on objective and reasonable criteria: the privileged treatment of Roman Catholic schools is enshrined in the Constitution, as Roman Catholic schools are incorporated as a distinct part of the public school system, the differentiation is between private and public schools, not between private Roman Catholic schools and private schools of other denominations, and the aims of the public secular education system are compatible with the Covenant.

10.4 The Committee begins by noting that the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective. In the instant case, the distinction was made in 1867 to protect the Roman Catholics in Ontario. The material before the Committee does not show that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools. Accordingly, the Committee rejects the State party's argument that the preferential treatment of Roman Catholic schools is non-discriminatory because of its Constitutional obligation.

10.5 With regard to the State party's argument that it is reasonable to differentiate in the allocation of public funds between private and public schools, the Committee notes that it is not possible for members of religious denominations other than Roman Catholic to have their religious schools incorporated within the public school system. In the instant case, the author has sent his children to a private religious school, not because he wishes a private non-Government dependent education for his children, but because the publicly funded school system makes no provision for his religious denomination, whereas publicly funded religious schools are available to members of the Roman Catholic faith. On the basis of the facts before it, the Committee considers that the differences in treatment between Roman Catholic religious schools, which are publicly funded as a distinct part of the public education system, and schools of the author's religion, which are private by necessity, cannot be considered reasonable and objective.

10.6 The Committee has noted the State party's argument that the aims of the State party's secular public education system are compatible with the principle of non-discrimination laid down in the Covenant. The Committee does not take issue with this argument but notes, however, that the proclaimed aims of the system do not justify the exclusive funding of Roman Catholic religious schools. It has also noted the author's submission that the public school system in Ontario would have greater resources if the Government would cease funding any religious schools. In this context, the Committee observes that the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one

religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under article 26 of the Covenant to equal and effective protection against discrimination.

10.7 The Committee has noted the author's arguments that the same facts also constitute a violation of articles 18 and 27, read in conjunction with article 2(1) of the Covenant. The Committee is of the opinion that in view of its conclusions in regard to article 26, no additional issue arises for its consideration under articles 18, 27 and 2(1) of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide an effective remedy, that will eliminate this discrimination.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] A 1991 census is quoted as indicating that 44 per cent of the population is Protestant, 36 per cent is Catholic, and 8 per cent have other religious affiliations.

[2] Blom v. Sweden, Views adopted on 4 April 1988, selected decisions volume 2, CCPR/C/OP/2.

[3] Lindgren and Lundquist v. Sweden, Views adopted on 9 November 1990 (CCPR/C/40/D/298-299/1988).

[4] See Bossuyt, Guide to the Travaux Préparatoires of the ICCPR, 1987, at 369.

[5] The State party makes reference to Nowak, UN Covenant on Civil and Political Rights, CCPR commentary, at 330-333.

[6] Nowak, UN Covenant on Civil and Political Rights, CCPR commentary at 481, 504.

[7] Counsel refers to the jurisprudence of the European Court of Human Rights in relation to article 14 of the European Convention on Human Rights, which recognizes that a measure which in itself is in conformity with the requirements of the article enshrining the right or freedom in question may however infringe this article when read in conjunction with article 14 for the reason that it is of a discriminatory nature. (Judgement of 23 July 1968, relating to certain aspects of the laws on the use of languages in education in Belgium).

APPENDIX

Individual opinion by member Martin Scheinin (concurring)

While I concur with the Committee's finding that the author is a victim of a violation of article 26 of the Covenant, I wish to explain my reasons for such a conclusion.

1. The Covenant does not require the separation of church and state, although countries that do not make such a separation often encounter specific problems in securing their compliance with articles 18, 26 and 27 of the Covenant. Varying arrangements are in place in States parties to the Covenant, ranging from full separation to the existence of a constitutionally enforced state church. As the Committee has expressed in its General Comment No. 22 [48] on article 18, the fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, "shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers" (para. 9).

2. The plurality of acceptable arrangements in the relationship between state and religion relates also to education. In some countries, all forms of religious instruction or observance are prohibited in public schools, and religious education, protected under article 18 (4), takes place either outside school hours or in private schools. In some other countries there is religious education in the official or majority religion in public schools, with provision for full exemption for adherents of other religions and non-religious persons. In a third group of countries instruction in several or even all religions is offered, on the basis of demand, within the public system of education. A fourth arrangement is the inclusion in public school curricula of neutral and objective instruction in the general history of religions and ethics. All these arrangements allow for compliance with the Covenant. As was specifically stated in the Committee's General Comment No. 22 [48], "public education that includes instruction in a particular religion or belief is inconsistent with article 18 (4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians" (para. 6). This statement reflects the Committee's findings in the case of Hartikainen et al. v. Finland (Communication No. 40/1978).

3. In the present case the Committee correctly focussed its attention on article 26. Although both General Comment No. 22 [48] and the Hartikainen case are related to article 18, there is a considerable degree of interdependence between that provision and the non-discrimination clause in article 26. In general, arrangements in the field of religious education that are in compliance with article 18 are likely to be in conformity with article 26 as well, because non-discrimination is a fundamental component in the test under article 18 (4). In the cases of Blom v. Sweden (Communication No. 191/1985) and Lundgren et al. and Hjord et al. v. Sweden (Communications 288 and 299/1988) the Committee elaborated its position in the question what constitutes discrimination in the field of education. While the Committee left open whether the Covenant entails, in certain situations, an obligation to provide some public funding for private schools, it concluded that the fact that private schools, freely chosen by the parents and their children, do not receive the same level of funding as public schools does not amount to discrimination.

4 In the Province of Ontario, the system of public schools provides for religious instruction in one religion but adherents of other religious denominations must arrange for their religious education either outside school hours or by establishing private religious schools. Although arrangements exist for indirect public funding to existing private schools, the level of such funding is only a fraction of the costs incurred to the families, whereas public Roman Catholic schools are free. This difference in treatment between adherents of the Roman Catholic religion and such adherents of other religions that wish to provide religious schools for their children is, in the Committee's view, discriminatory. While I concur with this finding I wish to point out that the existence of public Roman Catholic schools in Ontario is related to a historical arrangement for minority protection and hence needs to be addressed not only under article 26 of the Covenant but also under articles 27 and 18. The question whether the arrangement in question should be discontinued is a matter of public policy and the general design of the educational system within the State party, not a requirement under the Covenant.

5 When implementing the Committee's views in the present case the State party should in my opinion bear in mind that article 27 imposes positive obligations for States to promote religious instruction in minority religions, and that providing such education as an optional arrangement within the public education system is one permissible arrangement to that end. Providing for publicly funded education in minority languages for those who wish to receive such education is not as such discriminatory, although care must of course be taken that possible distinctions between different minority languages are based on objective and reasonable grounds. The same rule applies in relation to religious education in minority religions. In order to avoid discrimination in funding religious (or linguistic) education for some but not all minorities States may legitimately base themselves on whether there is a constant demand for such education. For many religious minorities the existence of a fully secular alternative within the public school system is sufficient, as the communities in question wish to arrange for religious education outside school hours and outside school premises. And if demands for religious schools do arise, one legitimate criterion for deciding whether it would amount to discrimination not to establish a public minority school or not to provide comparable public funding to a private minority school is whether there is a sufficient number of children to attend such a school so that it could operate as a viable part in the overall system of education. In the present case this condition was met. Consequently, the level of indirect public funding allocated to the education of the author's children amounted to discrimination when compared to the full funding of public Roman Catholic schools in Ontario.

(Signed) Martin Scheinin

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

I. Communication No. 701/1996, Gomez v. Spain
(Views adopted on 20 July 2000, sixty-ninth session)*

Submitted by:	Cesario Gómez Vázquez (Represented by José Luis Mazón Costa)
Alleged victim:	Author
State party:	Spain
Date of communication:	29 May 1995
Date of admissibility decision:	23 October 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 July 2000,

Having concluded its consideration of communication No. 701/1996 submitted to the Human Rights Committee by Mr. Cesario Gómez Vázquez under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Cesario Gómez Vázquez, a Spanish citizen born in 1966 in Murcia, formerly employed as a physical education teacher. He is currently living in hiding somewhere in Spain. He claims to be the victim of violations by Spain of articles 14, paragraph 5, and 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel, Mr. José Luis Mazón Costa.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. P.N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden, Mr. Hipólito Solari Yrigoyen and Mr. Abdallah Zakhia.

Facts as submitted by the author

2.1 On 22 February 1992, the author was sentenced to 12 years and one day by the Provincial Court (Audiencia Provincial) of Toledo for the attempted murder (asesinato en grado de frustración) of one Antonio Rodriguez Cottin. The Supreme Court (Tribunal Supremo) rejected his appeal on 9 November 1993.

2.2 At around 4 a.m. on 10 January 1988, Antonio Rodriguez Cottin was stabbed five times in a car lot outside a discotheque in Mocejón, Toledo. The wounds required 336 days' hospitalization and a total of 635 days for complete recovery.

2.3 The case for the prosecution was that the author, who had been working as doorman at the discotheque, saw the victim drive into the car lot and went out to talk to him, asking him to get out of the car. While they argued, an unidentified car came up to them, a person got out asking for a light and, when Mr. Rodriguez turned around, the author allegedly stabbed him in the back and neck.

2.4 The author has consistently denied this description of the events and maintains that, on 10 January 1988, he left the discotheque between 2 and 2.30 a.m., going home to Mostoles, Madrid, as he was feeling ill. He was taken home by Benjamin Sanz Carranza, Manuela Vidal Ramirez and another woman. When he arrived at his home at 3.15 a.m., he asked his flatmate for an aspirin and remained in bed all the following day. The author knew the victim, who was a frequent visitor to the discotheque, and considered him to be a violent person. The author states that, on 5 December 1987, Mr. Rodriguez had had an argument with Julio Pérez, the owner of the discotheque, and drawn a knife on him. During the trial, the author claimed that the assault on Mr. Rodriguez on 10 January 1988 was a settling of accounts between the victim and someone in the underworld of which he is a part.

2.5 During the trial, both the author and the prosecutor called witnesses to corroborate their respective versions.[1]

2.6 Counsel states that the author did not file an appeal (recurso de amparo) because, as the right to an appeal is not covered by articles 14-38 and, in particular, article 24, paragraph 2, of the Spanish Constitution, the appeal would simply have been rejected. He later submitted an additional allegation to the effect that the Constitutional Court's repeated rejection of amparo applications made them an ineffective remedy. Consequently, he considers the requirement of exhaustion of domestic remedies to have been duly met.

The complaint

3.1 The author's complaint concerns primarily the right to an effective appeal against conviction and sentence. He argues that the Spanish Criminal Procedure Act (Ley de Enjuiciamiento Criminal) violates articles 14, paragraph 5, and 26 of the Covenant because those charged with the most serious crimes have their cases heard by a single judge (Juzgado de Instrucción), who conducts all the pertinent investigations and, once he considers the case ready for the hearing, refers it to the Provincial Court (Audiencia Provincial), where a panel of three judges is in charge of proceedings and hands down the sentence. Their decision is subject to

judicial review proceedings only on very limited legal grounds. There is no possibility of a re-evaluation of the evidence by the Court of Cassation, as all factual determinations by the lower court are final. By contrast, those convicted of less serious crimes for which sentences of less than six years' imprisonment have been imposed have their cases investigated by a single judge (Juzgado de Instruccion) who, when the case is ready for the hearing, refers it to a single judge ad quo (Juzgado de lo Penal), whose decision may be appealed before the Provincial Court (Audiencia Provincial), thus ensuring an effective review not only of the application of the law, but also of the facts.

3.2 Counsel claims that, as the Supreme Court does not re-evaluate evidence, the above constitutes a violation of the right to have one's conviction and sentence reviewed by a higher court according to law. In this context, the author's lawyer cites the decision of 9 November 1993 rejecting the application for judicial review filed on behalf of Mr. Cesario Gómez Vázquez, the first ground of which states:

> " ... since it must also be pointed out that such evidence has to be evaluated exclusively by the court ad quo in accordance with the provisions of article 741 of the Criminal Procedure Act.
>
> " ... The appellant therefore recognizes that there is a great deal of evidence for the prosecution and his arguments consist only in interpreting this evidence according to his own way of thinking - and this approach is inadmissible when the principle of the presumption of innocence is invoked because, if it were allowed, it would change the nature of the judicial review and turn it into an appeal ... "

The second ground states:

> "[in this case] ... of the principle in 'dubio pro reo', the result is also rejection because the complainant forgets that this principle cannot be the subject of a review for the obvious reason that that would mean re-evaluating the evidence and such an evaluation is, as we have stated and repeated, not admissible."

3.3 Counsel further claims that the existence of different recourse procedures, depending on the gravity of the offence, implies a discriminatory treatment of persons convicted of serious offences, constituting a violation of article 26 of the Covenant.

3.4 The author states that the communication has not been submitted to another procedure of international investigation or settlement.

State party's observations and comments on admissibility and author's comments

4.1 In its submission under rule 91 of the Committee's rules of procedure, the State party requested the Committee to declare the communication inadmissible for failure to meet the requirement contained in article 5, paragraph 2, of the Optional Protocol, namely, exhaustion of domestic remedies, as the author had not lodged an appeal with the Constitutional Court, and

referred in this connection to the position of the European Commission of Human Rights, which has systematically denied admissibility in cases involving Spain when an amparo application has not been filed. The State party claimed that the author's defence was inconsistent, as counsel had stated in a first submission that he had not filed an application for amparo because the right to an appeal is not protected by the Spanish Constitution and had subsequently corrected that allegation in a second submission in which he had stated that his failure to file an application for amparo had been due to the Constitutional Court's repeated rejection of such appeals. The State party also maintained that the communication was inadmissible for failure to exhaust domestic remedies, since this question had never been brought before the Spanish courts.

4.2 The State party further claimed that the case was inadmissible because the author had abused his right to submit a communication, as his whereabouts were unknown and he had placed himself beyond the reach of the law. Lastly, the State party expressed doubts regarding counsel's right to represent the author, as counsel did not have sufficient authority and had not sought the permission of the previous defence counsel.

5.1 Counsel admitted that he had claimed in his initial submission that no effective remedy was available before the Constitutional Court. When he realized his error, he had made an additional submission, however, claiming that the said remedy was ineffective because the Constitutional Court had repeatedly rejected it (Constitutional Court judgement attached), and he referred to the Committee's case law on this point.[2]

5.2 Counsel admitted that the author's whereabouts were unknown, but claimed that this had not been an obstacle in other cases which the Committee had accepted. With regard to the doubts about his right to represent the author, counsel regretted that the State party did not clearly explain the real reasons, if any, for such doubts.

Decision of the Committee on admissibility

6.1 At its sixty-first session, of October 1997, the Committee considered the admissibility of the communication. It ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter had not been examined under another procedure of international investigation or settlement.

6.2 The Committee noted that the State party had challenged the communication on the ground of failure to exhaust domestic remedies. The Committee referred to its case law, in which it had repeatedly found that, for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must be both effective and available. With regard to the State party's argument that the author should have filed an appeal for amparo before the Constitutional Court, the Committee noted that the Constitutional Court had repeatedly rejected similar applications for amparo. The Committee considered that, in the circumstances of the case, a remedy which had no chance of being successful could not count as such and did not need to be exhausted for the purposes of the Optional Protocol. The Committee accordingly finds that article 5, paragraph 2 (a), of the Optional Protocol is not an obstacle to consideration of the complaint, which might raise issues under article 14, paragraph 5, and article 26 of the Covenant.

Comments of the State party on the merits and author's response

7.1 In its submission dated 31 May 1999, the State party reiterates its view with regard to the inadmissibility of the complaint because the issues which are now being brought before the Committee were not raised at the domestic level. It also believes that the domestic appeals[5] in respect of the allegations of violation of article 14, paragraph 5, and article 26, of the Covenant were not lodged on time and in the correct form, resulting in their dismissal.

7.2 Counsel for the State maintains that the allegations made to the Committee are abstract and aim to amend the law in general; they do not relate specifically to Mr. Gómez Vásquez, and therefore he does not have the status of a victim. Consequently, since there is no victim in the sense of article 1 of the Optional Protocol, the State party considers that the case should be declared inadmissible.

7.3 Counsel for the State also maintains that, since Mr. Gómez Vásquez has placed himself beyond the reach of the law and is a fugitive from justice, the case should be dismissed, since the "clean hands" principle has been violated. Counsel for the State considers that, since the complaint was not brought before the national judicial bodies, the author does not have the capacity to be the victim of a violation of a human right, particularly since not only was no violation invoked at the domestic level, but also the facts established by the judiciary were explicitly accepted.

7.4 Counsel for the State affirms that it was only after the appointment of a new lawyer that the author requested a review of all the judicial proceedings. He also contends that the appointment of the lawyer to appear at the international level was defective in terms of form. According to counsel for the State, when appointing a lawyer at the domestic level, the author made the appointment through a public document, while at the international level he did so by means of a mere paper.

7.5 As to the allegation of violation of article 26, the State party maintains its view already expressed at the stage of admissibility that two separate types of crimes are being compared, on the one hand the most serious crimes and, on the other hand, less serious crimes. In this respect the State party believes that a differentiation in the treatment of the two different types of crimes cannot possibly constitute discrimination.

7.6 As to the question of violation of article 14, paragraph 5, in the author's case, the State party explains that not only did the author's lawyer not raise the question of the lack of a full appeal or of a complete review of the proceedings when applying for a review, but he also explicitly recognized in his submission to the Supreme Court that: "In claiming a constitutional presumption of innocence, we do not aim to subvert or distort the purposes of an appeal, and convert it into a second judicial instance". Moreover, not only did the author not file an appeal for amparo with the Constitutional Court after the rejection of the appeal on 9 December 1993, but also, and instead, on 30 December he applied to the Ministry of Justice for a pardon, and as a first plea affirmed: "The conduct of the undersigned has always been irreproachable, with the exception of the crime committed, which was an isolated incident in his life and for which he has given ample demonstrations of remorse". Also, in a submission to the court of Toledo, of 14 January 1994, the author affirms: "The crime for which he is being sentenced is an isolated

incident in his life, and at all times he has shown a fervent and sincere desire to be reintegrated into society". The State party therefore considers that it cannot be argued that there was a violation of the Covenant, since the author has accepted the facts as established by the Spanish courts.

8.1 The author's lawyer, in his response to the State party's allegations dated 8 November 1998, rejects the State party's contentions that the communication is abstract and the author does not have the status of a victim, since the author was sentenced on the basis of contradictory evidence and did not have an opportunity to request a review, or a re-evaluation of the evidence in a higher court, which took up only the legal aspects of the sentence.

8.2 The author's lawyer rejects the State party's claim that he is not authorized to represent the author since he sought the permission of the previous representative of Mr. Gómez Vázquez before beginning to act in his defence at the international level; he also contends that neither the Covenant, nor its Optional Protocol, nor the Committee's case law requires that representation by counsel should be effected by means of a document granted by a public authenticating officer, so that he believes that the State party's allegation is completely groundless.

8.3 As to the allegation by counsel for the State that article 26 has not been at issue because there are two different categories of crimes and therefore they do not have to be treated in the same way under the law, the author's counsel reiterates that the claim is not based on differential treatment of two different types of crimes, but on the fact that in the Spanish legal system, persons convicted of the most serious crimes do not have the possibility of a complete review of their convictions and sentences, in violation of article 14, paragraph 5, of the Covenant.

8.4 With regard to the alleged renunciation of his rights under article 14, paragraph 5, by drafting the appeal document subject to the limitations laid down under the Criminal Procedure Act, counsel explains that in the Spanish system of judicial appeals, acceptance of the legal limits of appeals made before a court is a condition sine qua non for the appeal to be accepted for processing and subsequently considered. This cannot possibly be interpreted as a renunciation of the right to a sentence being reviewed in its entirety. The author's counsel maintains that the author's lawyer in the domestic court applied only for the partial review allowed under Spanish law, and it is precisely for this reason that there is a violation of article 14, paragraph 5; in this respect, he cites the Committee's case law.[4]

8.5 Counsel explains that the Committee is not being asked to evaluate the facts and evidence established in the case, a matter which in any case is beyond its jurisdiction, as the State affirms, but merely to ascertain whether the review of the sentence which convicted the author met the requirements of article 14, paragraph 5 of the Covenant. Counsel maintains that the case law submitted by the State party, 29 verdicts of the Supreme Court, have no connection with the denial of the author's right of appeal. Moreover, a careful examination of the texts of the verdicts shows that they lead to conclusions which are the opposite of those claimed by the State, since most of them recognize that criminal appeals are subject to severe limitations as to the possibility of reviewing the evidence brought before the court of the first instance. The criminal section of the Supreme Court did not review the evaluation of the evidence carried out by the court of the first instance in any of these cases unless there was some violation of the law or

there was a gap in the evidence which would support a violation of the right to presumption of innocence or if the factual observations made in the sentence were in contradiction with documents which demonstrated the error.

8.6 The State party alleges that article 14, paragraph 5, of the Covenant does not require that a remedy of review should be specifically termed a remedy of appeal and that the Spanish criminal appeal fully satisfies the requirements in the second instance although it does not allow review of the evidence except in extreme cases which are specified in the law. In view of the foregoing, counsel believes that the criminal proceedings against his client and specifically the sentence convicting him were vitiated by the lack of a full review of the legal and factual aspects, so that the author was denied the right guaranteed under article 26 of the Covenant.[5]

Consideration on the merits

9 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with the provisions of article 5, paragraph 1, of the Optional Protocol.

Review of admissibility

10.1 With respect to the State party's claim of inadmissibility on the ground of failure to exhaust domestic remedies, the Committee has consistently taken the view that a remedy does not have to be exhausted if it has no chance of being successful. In the case under consideration, the case law of the Spanish Constitutional Court shows repeated and recent rejections of applications for amparo against conviction and sentence. The Committee therefore considers, as it did upon determining the admissibility of this case on 23 October 1998, that there is no obstacle to its consideration of the merits.

10.2 With respect to the State party's claim that the author is not a victim because his counsel's objective is to amend Spanish legislation, and that the case is therefore inadmissible, the Committee points out that the author was convicted by a Spanish court and that the issue before the Committee is not the amendment, in the abstract, of Spanish legislation, but whether or not the appeals procedure followed in the author's case provided the guarantees required under the Covenant. The Committee therefore considers that the author can be considered a victim in accordance with the requirements of article 1 of the Optional Protocol.

10.3 With respect to the State party's allegation that the communication should be declared inadmissible because the author abused his right to lodge a complaint, since he did not serve his sentence and is currently a fugitive from justice, in violation of Spanish law, the Committee reiterates[6] its position that an author does not lose his or her right to lodge a complaint under the Optional Protocol simply because he or she has not complied fully with an order imposed by a judicial authority of the State party against which the complaint was lodged.

10.4 Lastly, with respect to the final ground of inadmissibility claimed by the State party, to the effect that the author's counsel does not have the right to represent him before the Human Rights Committee, the Committee takes note of the State party's claim, but reiterates that there are no specific requirements for representation before it and that the State party does not question

whether or not Mr. Gómez Vázquez's counsel represents him, but only whether certain formalities that are not required by the Covenant have been fulfilled. The Committee therefore considers that the author's counsel is acting in accordance with the instructions of the principal and, therefore, legitimately represents him.

Substantive issues

11.1 As to whether the author has been the victim of a violation of article 14, paragraph 5, of the Covenant because his conviction and sentence were reviewed only by the Supreme Court on the basis of a procedure which his counsel, following the criteria laid down in article 876 et seq. of the Criminal Procedure Act, characterizes as an incomplete judicial review, the Committee takes note of the State party's claim that the Covenant does not require a judicial review to be called an appeal. The Committee nevertheless points out that, regardless of the name of the remedy in question, it must meet the requirements for which the Covenant provides. The information and documents submitted by the State party do not refute the author's complaint that his conviction and sentence were not fully reviewed. The Committee concludes that the lack of any possibility of fully reviewing the author's conviction and sentence, as shown by the decision referred to in paragraph 3.2, the review having been limited to the formal or legal aspects of the conviction, means that the guarantees provided for in article 14, paragraph 5, of the Covenant have not been met. The author was therefore denied the right to a review of his conviction and sentence, contrary to article 14, paragraph 5, of the Covenant.

11.2 With regard to the allegation that article 26 of the Covenant was violated because the Spanish system provides for various types of remedy depending on the seriousness of the offence, the Committee considers that different treatment for different offences does not necessarily constitute discrimination. The Committee is of the opinion that the author has not substantiated the allegation of a violation of article 26 of the Covenant.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, in respect of Mr. Cesario Gómez Vázquez.

13. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author's conviction must be set aside unless it is subjected to review in accordance with article 14, paragraph 5, of the Covenant. The State party is under an obligation to take the necessary measures to ensure that similar violations do not occur in future.

14. Considering that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the Spanish being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The author's witnesses at the trial were his girlfriend and his flatmate, who clearly had close ties with him, whereas the prosecution witnesses knew him only by sight.

[2] Communication No. 445/1991, Champagne, Palmer and Chisholm v. Jamaica. Views adopted on 18 July 1994.

[3] From information submitted by the State party, this refers only to the application for amparo, even though the plural form "appeals" is used.

[4] Communications 623-626/1995, Domukovsky and others v. Georgia. Views adopted on 6 April 1998.

[5] In this respect counsel cites information from the press referring to part of the judicial memorandum of 1998 of the Basque Supreme Court of Justice indicating that the Supreme Court of Justice of the Basque country considers the need for referral to the second instance in criminal cases to be indisputable, since, in its view, there is no doubt that this shortcoming is not remedied by an appeal.

[6] Communication 526/1993, Hill v. Spain. Views adopted on 2 April 1997.

J. Communication No. 711/1996, Dias v. Angola
(Views adopted on 20 March 2000, sixty-eighth session)*

Submitted by:	Carlos Dias
Alleged victims:	The author and Carolina de Fatima da Silva Francisco
State party:	Angola
Date of communication:	28 March 1996 (initial submission)
Date of admissibility decision:	20 March 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 March 2000,

Having concluded its consideration of communication No. 711/1996 submitted to the Human Rights Committee by Mr. Carlos Dias under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Carlos Dias, a Portuguese national. He submits the communication on his own behalf and of that of Carolina de Fátima da Silva Francisco, an Angolan national, killed on 28 February 1991. He does not invoke any articles of the Covenant. The Covenant and the Optional Protocol thereto entered into force for Angola on 9 February 1992.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Facts as submitted by the author

2.1 The author has a business in Angola, with a head office in Luanda. In February 1991, he was away on business and his business partner and companion Carolina da Silva stayed at the premises in Luanda. She was killed in the night of 28 February 1991. The author arrived back from his trip the following morning. The guard on duty was found severely wounded and later died of his injuries. The safe was found open and a large sum of money removed.

2.2 The author states that the murder was never seriously investigated by the Angolan police, despite several urgent requests made by him. The author then decided to start his own investigations and, in the beginning of 1993, published a series of advertisements in newspapers in Angola and in other countries, despite the fact that the Angolan authorities refused to give permission for these publications and actually threatened him if he would do so. Following the advertisements, the author came in contact with an eye witness to the crime.

2.3 This eye witness, an Angolan national born on 16 June 1972, in a statement made on 23 November 1993 in Rio de Janeiro, stated that at the time she was the girlfriend of one Victor Lima, adviser to the President of Angola in charge of international affairs. In the evening of 27 February 1991, Mr. Lima came to pick her up to go for a drive in his car. Later that night they picked up four friends of his. According to the witness the five men started to complain about Angolans who worked for white men, and said that they would eliminate 'this black girl who is working with the whites'. After a while they stopped at a house, and a black woman, whom the witness did not know, but who apparently knew Mr. Lima and his friends, opened the door. They went inside, took drinks, and then the men said that they wanted to speak to the woman alone, upon which they retired to a side room. The witness remained behind. After a while she heard loud voices, and then the woman started to scream. The witness became afraid and wanted to flee, but was prevented from leaving by the security guard. She then took up a position in the room from where she could see what was happening, and saw the woman being raped by the men. Mr. Lima, the last one to rape her, then took her neck and twisted it. Upon leaving the premises, the witness was threatened by the men and told never to reveal what she had seen. Soon thereafter the witness left Angola out of fear.

2.4 The witness' sister was married to an inspector for secret services of the Angolan Ministry of the Interior. In a statement, made on 15 September 1993 in Rio de Janeiro, he confirms that Carolina da Silva was being kept under surveillance by the secret police, officially for being suspected of furnishing political-military information to the South African Government, through her contacts with whites, but according to the statement, in reality because she had rejected the amorous proposals of the Chief of the Security Services of the Cabinet of the President and National Director of the Secret Service, Mr. Jose Maria.

2.5 The author states that the eye witness' brother-in-law, the inspector who gave the statement referred to above, disappeared on 21 February 1994, while in Rio de Janeiro.

2.6 The author informed the President of Angola about his discoveries in a letter sent by his lawyer, pointing out that the perpetrators of the crime belonged to his inner circle. On 8 March 1994, a meeting was held with the Angolan consul in Rio de Janeiro, who informed the author that the Government might send a mission to Rio de Janeiro. However, nothing

happened. On 19 April 1994, the judicial adviser of the President, in a letter to the author's lawyer, stated that he was aware of the urgency of solving the case, and on 26 June 1994, a meeting took place in Lisbon between the judicial adviser and the Secretary of the Council of Ministers on the one side and the author and his lawyer on the other. However, no further progress seems to have been achieved, and on 8 September 1994 an official communique was issued by the Angolan Minister of the Interior, stating that the police contested declarations on the death of Carolina da Silva and accusing the author of trying to bribe the Government.

2.7 Since then, the author has continued to try in vain to have the perpetrators of the murder brought to justice. In March 1995, he began a civil action against Angola in the civil court of Lisbon, to recover unsettled debts. In July 1995, he applied to the Criminal Court in Lisbon against the perpetrators of the murder, apparently under article 6 of the Convention against Torture.

2.8 According to the author, the murder of his companion was planned by the Head of the Military House of the President, the vice-Minister of the Interior, the Minister of State Security and the Minister of Foreign Affairs. In this connection, he states that Carolina da Silva had been arrested on 6 October 1990 and kept in detention for 36 hours, because she had refused to open the safe of the enterprise owned by the author.

2.9 The author states that since the murder, he has not been able to live and do his business in Angola, because of threats. He has left Angola, leaving his properties (real estate, furniture, vehicles) behind. He has not been able to bring a case in the Angolan courts, since no lawyer wants to take the case, as it involves Governmental officials. In this context, he states that the lawyer who was representing Carolina's mother, withdrew from the case on 15 March 1994.

The complaint

3 The author claims that Angola has violated the Covenant, since it failed to investigate the crimes committed, keeps those responsible for the crimes in high positions, and harasses the author and the witnesses so that they can't return to Angola, with as a consequence for the author that he has lost his property. The author argues that, although the murder occurred before the entry into force for Angola of the Covenant and the Optional Protocol thereto, the above mentioned violations continue to affect the author and the witnesses.

The Committee's admissibility decision

4 By decision of 6 August 1996, the Special Rapporteur on New Communications of the Human Rights Committee transmitted the communication to the State party, requesting it, under rule 91 of the rules of procedure, to submit information and observations in respect of the admissibility of the communication. The State party did not forward such information, despite of several reminders addressed to it, the latest on 17 September 1997.

5.1 At its 62nd session, the Committee considered the admissibility of the communication. It ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

5.2 The Committee noted that it was precluded from considering the claim submitted on behalf of Ms. Carolina Da Silva, ratione temporis. In the absence of observations from the State party, the Committee was not aware of any other obstacles to the admissibility of the communication and considered that the communication submitted on behalf of Mr. Dias might raise issues under the Covenant which should be examined on their merits.

6. Accordingly, on 20 March 1998, the Human Rights Committee decided that the communication was admissible.

Issues and proceedings before the Committee

7. The Committee's decision declaring the communication admissible was transmitted to the State party on 1 May 1998, with the request that explanations or statements clarifying the matter under consideration should reach the Committee at the latest by 1 November 1998. No clarifications were received despite several reminders sent to the State party, the last one on 24 June 1999. The Committee recalls that it is implicit in the Optional Protocol that the State party make available to the Committee all information at its disposal and regrets the lack of cooperation of the State party. In the absence of any reply from the State party, due weight must be given to the author's allegations to the extent that they have been substantiated.

8.1 The Committee has considered the present communication in the light of all the written information before it, in accordance with article 5 (1) of the Optional Protocol.

8.2 The author has provided information to the effect that he has been harassed and threatened by the State party's authorities, when, in the absence of a serious investigation by the police, he started investigating the murder of his companion and found evidence that high ranking Government officials had been involved in the murder. The author's allegations in this respect have never been contradicted by the State party. The Committee notes that it has also not been disputed that one of the witnesses, who gave a statement to the author about the murder of his companion, disappeared shortly afterwards.

8.3 The Committee recalls its jurisprudence that article 9(1) of the Covenant protects the right to security of person also outside the context of formal deprivation of liberty. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction would render totally ineffective the guarantees of the Covenant.[1] In the present case, the author has claimed that the authorities themselves have been the source of the threats. As a consequence of the threats against him, the author has been unable to enter Angola, and he has therefore been prevented from exercising his rights. If the State party neither denies the threats nor cooperates with the Committee to explain the matter, the Committee must give due weight to the author's allegations in this respect. Accordingly, the Committee concludes that the facts before it disclose a violation of the author's right of security of person under article 9, paragraph 1, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 9, paragraph 1, of the Covenant.

10. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Dias with an effective remedy and to take adequate measures to protect his personal security from threats of any kind. The State party is under an obligation to take measures to prevent similar violations in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] See the Committee's Views in case No. 195/1985, Delgado Paez v. Colombia, paragraph 5.5, adopted on 12 July 1990, document CCPR/C/39/D/195/1985.

K. Communication No. 731/1996, Michael Robinson v. Jamaica (Views adopted on 29 March 2000, sixty-eighth session)*

Submitted by:	Michael Robinson (represented by Mr. Graham Huntley of the London law firm of Lovell White Durrant)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	9 December 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2000,

Having concluded its consideration of communication No. 731/1996 submitted to the Human Rights Committee by Mr. Michael Robinson under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Michael Robinson, a citizen of Jamaica, at the time of submission detained on death row in St Catherine's District Prison. His death sentence has since been commuted to life imprisonment. He claims to be a victim of violations by Jamaica of articles 7, 10, and 14, paragraphs 1, 2, 3(b), 3(d), 3(e) and 5, of the International Covenant on Civil and Political Rights. He is represented by Mr. Graham Huntley of the London law firm of Lovell White Durrant.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. An individual opinion by Member Louis Henkin is attached to the present document.

The facts as submitted by the author

2.1 The author was convicted for the murder of Chi Pang Chan and sentenced to death in the Home Circuit Court, Kingston, Jamaica on 21 November 1991. His application for leave to appeal against his conviction and sentence to the Court of Appeal in Jamaica was dismissed on 16 May 1994. In its judgment, the Court of Appeal classified his offence as capital murder under section 2(1)(d)(1) of the Offences Against the Person Act of 1992, on the ground that it was a murder committed in the course of a robbery. Thus, the Court of Appeal affirmed the sentence of death. The author's subsequent petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 19 November 1996. On the same day, the Court of Appeal reviewed and reconfirmed the classification of the author's conviction as capital murder. Also on the same day, the author's counsel wrote to the Governor General of Jamaica and requested a commutation of the death sentence, submitting that since the author had spent five years on death row, he had been subject to inhuman and degrading treatment contrary to his rights under section 20 of the Jamaican Constitution. On 5 December 1996, the author was informed that the Governor General would not commute his death sentence. Instead, on the same day, a warrant was issued for the execution to be carried out on 19 December 1996. However, the author's death sentence was subsequently commuted to life imprisonment. A warrant to this effect was read to the author on 4 July 1997 [1]

2.2 Chi Pang Chan was stabbed to death during the course of a robbery on the afternoon of Wednesday 27 June 1990 at Sheila Place, Queensborough, in Kingston, Jamaica. The prosecution's case against the author was based on circumstantial and confession evidence.

2.3 The author's aunt, Ruby Campbell, resided in Diana Place, an avenue some four blocks away from Sheila Place, where Mr. Chan was killed. She testified that Mr. Chan, whom she had known and done business with for several years, came to her house on most Wednesday afternoons in connection with her travelling to Miami on business. On these occasions, he would often give her US dollars, either cash in the hand to make purchases in Miami, or in an envelope to give to his uncle there. To questions as to whether Mr. Chan was expected on the Wednesday of the crime, she explained that he came most Wednesdays, but that he was not specifically expected this Wednesday. She further testified that Mr. Robinson had lived in her house for a period of five years until the year before the incident, and that he was well aware of the custom of Mr. Chan stopping by her house on Wednesday afternoons.

2.4 An eye witness to the crime, Victoria Lee, testified that she saw the deceased and a black man struggling together outside her house in Sheila Place, that the black man appeared to be trying to take an envelope from the other man, and that he stabbed him before fleeing into a gully.

2.5 Detective Acting Corporal McPherson testified that on 28 June 1990, the day after Mr. Chan had been killed, he went to the author's home twice, once alone and once along with Senior Superintendent Hibbert, and found a shirt, a pair of jeans and footwear which appeared to be bloodstained. Underneath the wardrobe in the author's bedroom, they found a plastic bag containing US dollars and Pounds Sterling. One of the US dollar bills appeared to be bloodstained. McPherson testified that the author, when confronted by Senior Superintendent Hibbert with these items, admitted that the clothes and the shoes were his, but that he had no

knowledge of the bills. The same testimony was given by Senior Superintendent Hibbert. A Government analyst at the Forensic Laboratory, Ms. Yvonne Cruickshank, testified that on examination, the items were found to be stained with blood of Group B, the same as that of Mr. Chan and about 18 per cent of the Jamaican population.

2.6 The author's sister, Ms. Charmaine Jones, who at the time of the crime was living in the same house as the author, testified that she saw the author on the morning of 27 June 1990 wearing the same clothes that were later seized by the police, and that they were not bloodstained at the time. Furthermore, she testified that the author usually carried a ratchet knife on a key ring, and that he had done so on the morning of 27 June 1990. When the author was taken to Waterford Police Station on 28 June 1990, the ratchet knife was missing from the key ring. Detective Acting Corporal McPherson testified that the author had explained that he usually kept a ratchet knife on his key ring, but that it had been broken three days earlier while he was digging out a coconut.

2.7 Senior Superintendent Hibbert and Sergeant Forrest testified that the author on 29 June 1990, at Bridgeport Police Station, in their and Assistant Superintendent Lawrence's presence, after being duly cautioned, confessed to stabbing Mr. Chan and taking his money. The detailed confession was taken down by Sergeant Forrest in a written statement, and signed by the author. The statement was admitted as evidence and was read to the jury.

2.8 The author gave evidence on oath that he did not know the deceased, nor had he ever met him at his aunt's house. He stated that he had only lived with his aunt for 6 months. On 27 June 1990, he was at Caymanas Park Race Course from noon until 5:30 p.m. He denied owning any of the items produced by the prosecution (clothes, shoes, bank notes) and stated that he had never had a ratchet knife on his key ring. He denied making any of the confessions, oral or written, and denied signing the statement purportedly made by him. He said that on first arriving at Waterford Police Station he was put in a cage and told "it better you stay in there more than get a gun shot". He stated that he was violently assaulted by police officers on 29 June 1990 at the time when Officer Hibbert claimed he made and signed the written confessions.[2]

2.9 Counsel argues that all available domestic remedies have been exhausted for the purposes of article 5, paragraph 2(b), of the Optional Protocol. While a constitutional motion might be open to the author in theory, it is not available in practise due to the State party's unwillingness or inability to provide legal aid for such motions and to the extreme difficulty of finding a Jamaican lawyer who would represent an applicant pro bono on a constitutional motion.

The complaint

3.1 Counsel alleges a violation of articles 7 and 10 on the ground that the author has been on death row for a period of over five years. It is submitted that the "agony of suspense resulting from such long awaited and expected death" amounts to cruel, inhuman and degrading treatment. Reference is made to the jurisprudence of the Privy Council.

3.2 Counsel also alleges a violation of articles 7 and 10 on the ground of the conditions of his incarceration at St. Catherine's District Prison. As to the general conditions, reference is made to reports by Americas Watch, Amnesty International and the Jamaican Council for Human Rights. The reports highlight that the prison is holding more than twice the capacity for which it was constructed in the 19th century, that there are no mattresses, other bedding or furniture in the cells, that there is a desperate shortage of soap, toothpaste and toilet paper, that the quality of food and drink is very poor, that there is no integral sanitation in the cells and there are open sewers and piles of refuse, that there is no artificial lighting in the cells and only small air vents through which natural light can enter, that there are almost no employment or recreational opportunities available to inmates, and that there is no doctor attached to the prison, leaving warders with very limited training to treat medical problems. In addition to the NGO reports, counsel makes reference to reports from prisoners, stating that the prison is infested by vermin, in particular rats, cockroaches, mosquitoes and, in rainy periods, maggots. Furthermore, the prisoners have stated that food is being prepared in the kitchen and the bakery despite these having been condemned for many years, that the prison often runs out of medication, that insufficient clothing is given to inmates, that there is no procedure for handling the complaints of inmates and that the organisation of the prison at times breaks down, with the result that the inmates are locked up in their cells for long periods of time, without access to washing facilities and having to ask for food and water to be brought to them. These alleged reports from prisoners are not enclosed.

3.3 Counsel submits that the particular impact of these general conditions upon the author is that he is confined to his cell for 22 hours every day in enforced darkness, isolated from other men and with nothing to keep him occupied. Reference is made to the UN Standard Minimum Rules for the Treatment of Prisoners.

3.4 Counsel alleges that the trial judge's instructions to the jury and his failure to exclude certain evidence amount to a denial of justice, which, according to the Committee's jurisprudence, constitutes a violation of article 14, paragraphs 1 and 2. As to the trial judge's instructions to the jury, counsel submits that the trial judge prejudiced the author's case in the following respects:

- the judge failed to remind the jury that the fact that no objection was made to the confession statement being admitted into evidence was irrelevant to the issue the jury had to decide, namely whether the statement was forged or not;

- the judge failed to direct the jury upon the law regarding self-defence as to the facts allegedly admitted by the author, notwithstanding that the author relied upon a defence of alibi in the trial;

- the judge failed to remind the jury of the description of the assailant given by Victoria Lee and Audley Wilson (Victoria Lee testified that the black man who she saw stabbing the deceased was wearing a blue shirt, or at least a shirt with blue in it, whilst the shirt that was seized by the police was white and black. Audley Wilson, another eye witness to the struggle, testified that the assailant was 5'8"-5'9", which is the author's height, but in the cross-examination it was made clear that he at the preliminary hearing had claimed that the assailant was "about 5' and a little".)

3.5 As to the oral and written confession evidence allegedly given by the author in answer to questions from Senior Superintendent Hibbert, counsel submits that this evidence should have been excluded on the ground that the author should have been charged with murder before the questions were put. Further, it is submitted that the judge should have reconsidered the admissibility of the confession evidence having heard the cross-examination of the police officers concerned and the sworn evidence of the author, notwithstanding his earlier ruling on the issue and the fact that defence counsel did not challenge the admissibility of the evidence.

3.6 Counsel alleges a violation of article 14, paragraph 3(e), on the ground that Miss Charmaine Jones and Miss Herma Ritchie, respectively the author's sister and her room-mate, were willing to give evidence as witnesses on the author's behalf before the Court of Appeal, but did not attend the appeal because they were intimidated by the police and told that they would be arrested if they appeared.

3.7 Counsel alleges a violation of article 14, paragraphs 1, 2, 3(b), 3(d) and 5, on the ground that defence counsel on appeal, Lord Gifford, made an erroneous submission that there was no arguable point in the author's case, and, contrary to the author's instructions, stated that the author had accepted this advice.[3] Counsel argues that Lord Gifford thereby failed to make a case as to whether the cautioned statement was forged or not. It is submitted that Lord Gifford failed to inform the Court both that he had advised the author to obtain a handwriting expert to review the signatures on the disputed statement, and that the author wanted to obtain such an expert, but did not have the necessary funds. Furthermore, counsel argues that Lord Gifford failed to ask for an adjournment to enable funds to be raised.

3.8 Counsel also alleges a violation of article 14, paragraph 5, on the ground that the original of the written confession was not available to the author or his counsel before the petition for special leave to the Privy Council, and therefore it could not be properly reviewed by a handwriting expert assigned by counsel. It is submitted that the State party has an obligation to preserve evidence relied upon in a trial at least until appeals have been exhausted, and that this obligation has been breached in this case with the effect that the author was deprived of an opportunity to place new material before the court.

The State party's submission and the author's comments thereon

4.1 In its submission of 14 February 1997, the State party raises no objections as to the admissibility of the communication, and offers its observations on the merits. The State party denies that any violation of the Covenant has occurred in the author's case.

4.2 With respect to the alleged violation of articles 7 and 10, paragraph 1, of the Covenant on the ground of "agony of suspense" suffered by the author due to the five years spent on death row, the State party submits that a prolonged stay on death row does not per se constitute cruel and inhuman treatment. Reference is made to the jurisprudence of the Committee.[4]

4.3 As regards the alleged violation of article 14, paragraphs 1 and 2, on the ground of the trial judge's summing up, the State party submits that this is not a matter to be considered by the Committee. The State party makes reference to the jurisprudence of the Committee where it

holds that it can only examine whether such instructions were manifestly arbitrary or amounted to a denial of justice. It is submitted that neither of these exceptions are applicable to the author's case.

4.4 The second alleged violation of article 14 concerns the conduct of the trial judge in regard to allowing the author's oral and written confession into evidence. The State party submits that these matters relate to facts and evidence which according to the Committee's jurisprudence are best left to Appellate courts. It is stated that these issues were in fact examined by the Court of Appeal.

4.5 As regards the alleged violation of article 14, paragraphs 1,2, 3(b), 3(d) and 5, on the ground that the attorney who represented the author on appeal allegedly did not seek an adjournment in order to enable funds to be raised to retain a handwriting expert and that he instead advised the Court of Appeal that he had nothing to argue and that this had been accepted by the author, the State party submits that this allegation is based on assertions of what instructions that were given and how these were carried out. It is submitted that this is not a matter of State responsibility: the State party's obligation is to appoint competent counsel to the accused, but it cannot be held responsible for how he has carried out his instructions when there is no indication that agents of the State party, by act or omission, prevented him from conducting the case as he saw fit.

4.6 With regard to the alleged violation of article 14, paragraph 3(e), because two potential defence witnesses failed to give evidence before the Court of Appeal as they were threatened by the police, the State party notes that "these are very serious allegations which go to the core of the administration of justice and cast serious aspersions on the integrity of members of the police force." The State party is of the view that "these allegations must be supported by the clearest and most unambiguous evidence or be promptly withdrawn."

5.1 In his comments of 9 October 1998, counsel explains that the author was moved off death row on 4 July 1997 and into the main section of the prison. It is stated that the author received no "official confirmation of the reason for his move". Furthermore, counsel states that "the author understands that the State party has generally indicated that prisoners who have had their sentences commuted according to the Pratt & Morgan decision must serve a minimum non-parole period of 7 years. It is not clear when the 7 years begin to run although in a recent decision in Jamaica, R v. Anthony, the judge ruled that the non-parole period for a prisoner convicted of non-capital murder should run from a date three months after the date of conviction." Counsel says that the author hopes that the same practice will be followed in all cases, but submits that the lack of clarity in this regard constitutes a "continuing uncertainty" in breach of articles 7 and 10. With regard to the conditions of detention, the author also submits that in the section of the prison to which he was moved on 4 July 1997, AIDS and HIV infections are common among the prisoners.

5.2 In his submission of 9 October 1998, the author also forwards a new claim under articles 7 and 10. It is submitted that on 5 March 1997, the author was beaten and hit in the head by some unnamed warders, sustaining a cut for which he received ten stitches. Furthermore, the author states that upon the instruction of the Prison Director, the warders destroyed all his belongings save for two suits. Allegedly, this occurred with the full knowledge and the

authorisation of two named superintendents. The author also claims that his visiting rights were suspended for three months and that the warder working on his section began harassing him. To substantiate this claim, counsel has forwarded a statement from the author dated 16 April 1997, an affidavit dated 14 July 1997 and an article in The Pen[5] of May 1997.

5.3 As regards the alleged violations of article 14, paragraphs 1 and 2, on the grounds of the trial judge's directions to the jury on the confession statement and the admission of this evidence, counsel submits that the judge's errors on these points amounted to a denial of justice. Counsel further submits that the judgment of the Court of Appeal does not indicate that these issues were examined by it.

5.4 With regard to the alleged violation of article 14, paragraphs 1,2, 3(b), 3(d) and 5, on the ground of the previously described acts and omissions of the legal aid attorney who represented the author on appeal, counsel makes reference to the jurisprudence of the Committee[6] and submits that a violation did occur as the legal aid attorney told the Court of Appeal that there was no merit in the application without the knowledge or consent of the author.

5.5 Counsel notes that the State party did not respond to the alleged violation of article 14(5) on the ground that the State party failed to preserve the original confession statement. Counsel reiterates the claim and makes reference to Walker and Richards v. Jamaica,[7] in which the authors "had made diligent efforts to obtain documents necessary to the determination of the case by the Privy Council and the lack of availability and delay in locating them was attributed to the State party." Counsel submits that there have been made comparable diligent efforts to obtain the original alleged confession statement. In this regard, counsel points out that on 24 January 1996 he wrote to the Private Secretary to the Governor-General of Jamaica, the solicitors for the Director of Public Prosecutions and the Privy Council clerk in Jamaica seeking the document. On 9 April 1996 he was provided with a copy. On 23 May 1996 and 3 June 1996, counsel again wrote to the Director for Public Prosecutions seeking the original. On 5 November 1996, the State party's counsel before the Privy Council stated that "it was accepted that the original document was lost and that this should not have happened ... normal procedure was for the return of original documents to the police station of arrest". Still according to counsel, the Privy Council clerk in Jamaica enquired at the police station on 21 November 1996, but obtained no information.

5.6 With regard to the two witnesses who allegedly failed to give evidence before the Court of Appeal because of police threats, counsel states that his agents in Jamaica, without success, have sought to obtain further evidence from these witnesses. According to counsel, contact was made with one of the witnesses but she repeated her unwillingness to give further evidence, suggesting that this was "because of intimidation by/fear of the authorities".

5.7 Counsel also alleges that because of the violations of article 14, also article 6, paragraph 2, was violated, since a death sentence was imposed contrary to the Covenant.

The State party's response and the author's further comments

6.1 In its response of 29 January 1999, the State party firstly contests that the author was not informed of the reason why he was removed from death row and placed in the main section of

the prison. The State party claims that on 4 July 1997, the Superintendent of the Saint Catherine Adult Correctional Centre read a copy of the warrant for commutation of the author's death sentence to the author. Therefore, it is submitted, the author was aware that his sentence was commuted as of 4 July 1997.

6.2 The State party further denies that there is any uncertainty as to when death row prisoners, whose sentences have been commuted, become eligible for parole. The State party submits that the Offences Against the Person (Amendment) Act is abundantly clear as to when commuted prisoners become eligible for parole. Reference is made to sections 5A and 6(4) which read:

> "Section 5A
>
> Where pursuant to section 90 of the Constitution, a sentence of death has been commuted to life imprisonment, the case of the person in respect of whom the sentence was so committed shall be examined by a Judge of the Court of Appeal who shall determine whether the person should serve a period of more than seven years before becoming eligible for parole and if so, shall specify the period so determined.
>
> Section 6(4)
>
> Subject to subsection (5), an inmate -
>
> (a) who has been sentenced to imprisonment for life; or
>
> (b) in respect of whom -
>
> (i) a sentence of death has been commuted to life imprisonment, and
>
> (ii) no period has been specified pursuant to section 5A shall be eligible for parole after having served a period of not less that seven years."

6.3 The State party points out that under these sections "a death row prisoner who has his sentence commuted, would pursuant to section 5A have to serve the period determined by the Judge, or serve a minimum of seven years pursuant to section 6(4), before he becomes eligible for parole." The State party denies that the judgment referred to by the author, R v. Anthony Lewis, makes it unclear when the parole period starts to run for a commuted prisoner. In that particular case, the crime committed by the applicant was re-classified as non-capital murder and he was sentenced to life imprisonment and to serve 20 years before becoming eligible for parole, starting from a date 3 months after the date of his conviction. In deciding so, the Judge relied on the discretion conferred on him by section 7(2)c of the same act which states that the judge may decide

> "whether, and if so to what extent, a specified period should elapse before the grant of parole in a case where murder is classified as non-capital murder."

6.4 With regard to the alleged beatings on 5 March 1997, the State party comments that the author tried to escape on that day and that it will undertake a further investigation of the episode, the results of which will be forwarded to the Committee. As to the conditions of detention in general, the State party states that notwithstanding the contents of the NGO reports referred to by the author, a generalized position cannot be adopted. Rather, the approach to be taken is to deal with the complaints individually and consider each case on its individual merits. In light of this, the State party undertakes to investigate the conditions of the author's detention, and states that the results of the inquiry will be submitted to the Committee.

6.5 With regard to the alleged violations of article 14, paragraphs 1 and 2, on the ground of the trial judge's directions on and admission of the confession statement, the State party reiterated its position that no violation occurred. The State party cites the jurisprudence[8] of the Committee and argues that there has been no denial of justice in the present case. The State party also reiterates its position with regard to the claim that article 14, paragraph 3(e), was violated as two potential defence witnesses allegedly had been threatened, and notes that the author has failed to produce any evidence to substantiate this claim. Furthermore, the State party submits that article 6, paragraph 2, has not been violated since the trial was lawful and in accordance with the Covenant.

6.6 With regard to the alleged violation of article 14, paragraph 5, on the ground of failure to preserve the author's alleged confession statement, the State party argues that the Walker and Richards case, to which the author refers, does not support his claim. The State party points to differences between the two cases as there in Walker and Richards, in spite of eight separate requests, was a delay of about 5 years before the author's representatives were informed by the Supreme Court of the availability of the authors' trial transcript and Court of Appeal judgment, documents that were necessary in the determination of the possibility for appeal to the Privy Council. In the present case, the author was provided with a copy three months after his first request. The State party submits that the failure in providing the original of the author's confession did not deprive him of his right to have his conviction and sentence reviewed in violation of article 14, paragraph 5. The State party points out that the Privy Council decided to dismiss the author's appeal even though one of the grounds of appeal was the State party's failure to preserve the original alleged confession statement.

6.7 With regard to the alleged violation of article 14, paragraphs 1,2, 3(b), 3(d) and 5, on the ground of the conduct of the author's appeal by his attorney, the State party makes reference to E. Morrison v. Jamaica[9] and Smart v. Jamaica,[10] and submits that the State party can not be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the court that the lawyer's behaviour was incompatible with the interests of justice. It is submitted that in the present case, counsel's conduct did not deny the author of his right to justice, nor did it amount to a breach of article 14.

7.1 In his comments of 12 April 1999, counsel explains that the author acknowledges that the commutation warrant was read to him on 4 July 1997 and that he did not wish to suggest that he was not aware of the reasons for the move to the main section of the prison. However, he does submit that he has received no official confirmation of the reason for the move.

7.2 As regards the alleged violation of articles 7 and 10, paragraph 1, on the ground of uncertainty as to when the non-parole period begins to run, counsel submits that the position remains unclear also after the State party's submission. From the State party's comment that the ruling in R v. Anthony Lewis only applies to that particular case, the author infers that the same solution (i.e. that the period commences three months after the date of conviction) will not be applied to other comparable cases, such as the author's own. It is submitted that although the minimum non-parole period is set by the Offences Against the Person (Amendment) Act 1992, "the date on which this period commences has not been set down or clarified in any case."

7.3 With regard to the alleged beatings on 5 March 1997 and the State party's claim that the author tried to escape on that day, the author submits, as held in his affidavit of 14 July 1997, that "although he cut the lock on his cell he did not leave his cell as he had changed his mind and decided not to try to escape."

7.4 As regards the alleged violations of article 14, paragraphs 1 and 2, on the grounds of the trial judge's directions to the jury on the confession statement and the admission of this evidence, the author reiterates his claims that the judge's instructions and summing up amounted to a denial of justice. It is further argued that the State party has made no effort to explain why this exception from the principle that the Committee shall not re-evaluate facts and evidence and the trial judge's instructions is not applicable in the present case.

7.5 On the issue of the author's appeal, and what instructions that were given and how these were carried out, counsel submits that the cases referred to by the State party are without relevance as they "can be distinguished on their facts." Counsel asserts that in the case of E. Morrison v. Jamaica, the allegations concerned the handling of the applicant's defence at the trial particularly with regard to failure to challenge the credibility of certain witnesses. In the case of Smart v. Jamaica, the applicant's counsel on appeal dropped two of the grounds of appeal, but not all, as in the present case. As opposed to these cases, it is submitted that the cases previously referred to by the author, i.e. Kelly v. Jamaica and Collins v. Jamaica, were "cases based on the same relevant facts" as in the author's case, because counsel in those cases "informed the Court of Appeal that there was no merit in the prisoners' appeals without the prisoners knowing they were going to do so and without their consent." Accordingly, it is submitted that the Committee should find a violation of article 14 also in this case.

Further submission from the State party, including the results of its investigation

8.1 In its submission of 2 November 1999, the State party again addresses the author's claims under articles 7 and 10, paragraph 1, and forwards the results of its investigations. As regards the claim that articles 7 and 10 were violated on account of the alleged uncertainty concerning the commencement of the non-parole period to be served by the author, the State party offers a further explanation to its position. Under the Offences Against the Person (Amendment) Act 1992, the judge performing the review (the reclassification) shall determine whether, and if so, to what extent, a specified period should elapse before the grant of parole in a case where murder is classifiable as non-capital (i.e. the "non-parole period"). A judge, therefore, has the discretion to decide how long a prisoner, who has had his sentence commuted, must serve before he becomes eligible for parole. It is submitted that this is exactly what happened in the author's case, as it

did in R. v. Anthony Lewis and all other cases where such reclassifications have been made. Consequently, the State party repeats its submission that the Act does not create uncertainty and that there has been no breach of the Covenant in this regard in this case.

8.2 With regard to the alleged beatings, the State party states that on 5 March 1997, the author, along with three other inmates, attempted to escape from the prison. Allegedly, they escaped from their cells by cutting the iron bars and locks on their cell doors, but the plot was foiled when they were caught attempting to leave through the gate to a workshop. Subsequently all the four inmates were placed in cell No. 19. When asked to leave this cell so that it could be searched, the inmates allegedly refused to comply and began acting boisterously, threatening the officers and using foul language. The State party claims that the officers repeated the orders several times during the subsequent 15 minutes, but the inmates still refused to obey and therefore had to be removed with force. After their removal, it was discovered that they had in their possession a piece of cutlass, a piece of iron pipe and two hacksaw blades.

8.3 The State party states that it was during the forced removal of the inmates that they were injured. As a result of the injuries, the inmates received medical attention from the medical doctor at the prison. He referred them to the Spanish Town Hospital where they were examined by a Dr. Donald Neil. In his report, Dr. Neil stated that the author was admitted to the hospital "complaining of sustaining blows all over his body from prison warders at the prison. ... [the] examinations revealed a conscious and alert young man with vital signs. There were multiple contusions to the lower back plus swelling and tenderness to the left posterior chest. There was a 4cm laceration to the right parietal scalp. There were multiple linear abrasions to the right thigh, the anterior surface of the left leg plus swelling and tenderness to the middle one-third of the right leg. X-ray of the skull revealed no fractures. Treatment consisted of tetanus toxoid, antibiotic injection and suturing of the scalp laceration. He was discharged on antibiotics and painkillers."

8.4 In conclusion, the State party acknowledges that the author was beaten on 5 March 1997 after attempting to escape from the prison. However, it is submitted that the beating could not have been avoided as the author, along with the other inmates, failed to follow instructions issued by prison officers. Consequently, the State party "denies that the occurrence on 5 March constituted a breach of articles 7 and 10, paragraph 1".

8.5 The State party further states that their investigations have shown that the allegations made against the Director of the prison are false: "No instructions were given to clean out and burn the [author's] belongings. The [author's] fellow inmates ... substantiate this finding, as they both stated that they did not hear [the] Director give orders to the warders to destroy or burn things." As regards the suspension of the author's privileges, the State party submits that this was ordered pursuant to section 35(1) of the Corrections Act, which lays down clear instructions with regard to punishment for major and minor correctional offences.

8.6 As regards the author's claim that after being taken off death row on 4 July 1997 he was moved to a section of the prison where AIDS and HIV are common among the prisoners, the State party notes that when interviewed,[11] the author stated that at no time during his prison sentence was he placed in a section where AIDS and HIV were common. Furthermore, the State

party claims that according to the author's prison record, he was moved from St. Catherine's District Prison to Tower Street Adult Correctional Centre shortly after the commutation of his death sentence.

8.7 In relation to the allegation that the author's conditions of detention at St. Catherine's District Prison violated articles 7 and 10, paragraph 1, of the Covenant, and in particular the allegation that the prison has inadequate medical service, the State party claims that the Prison "houses a Medical Centre that is staffed by two registered medical practitioners, a general practitioner and a psychiatrist. There is also a registered dentist. A matron who is a registered nurse, a qualified social worker and several medical orderlies assists these doctors. The general practitioner attends at the Medical Centre daily and when he is not on duty, he is on call; whilst the dentist attends at the Medical Centre three days every week. Additionally, when a prisoner makes a complaint of a medical nature, arrangements are made with a medical orderly for that prisoner to be taken to see the doctor at the very earliest opportunity. If the complaint is of a serious nature and a doctor is not on duty at the time or cannot be located, the prisoner is immediately dispatched to the Spanish Town General Hospital." The State party therefore denies that the prison has no or inadequate medical services in breach of articles 7 and 10. Furthermore, the State party denies that the prison, as alleged by the author, has no integral sanitation in the cells and that it is infested with vermin and that the kitchen and bakery have been condemned.

Issues and proceedings before the Committee

9.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

9.2 The Committee notes that the State party in its submissions has addressed the merits of the communication. This enables the Committee to consider both the admissibility and merits of the case at this stage, pursuant to rule 94, paragraph 1, of the rules of procedure. However, pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of any of the grounds of admissibility referred to in the Optional Protocol.

9.3 As to the claim that the author's detention on death row from 1992 to 1997 constitutes cruel, inhuman or degrading treatment, the Committee reiterates its constant jurisprudence[12] that detention on death row for any specific period of time does not per se constitute a violation of articles 7 and 10, paragraph 1, of the Covenant, in absence of further compelling circumstances. As neither the author nor his counsel have adduced any such circumstances, the Committee finds this part of the communication inadmissible under article 2 of the Optional Protocol. On the other hand, the author's claims of violations of the same provisions both on the ground of the alleged beatings on 5 March 1997 and on the ground of deplorable conditions of the author's detention in general are, in the view of the Committee, sufficiently substantiated to be considered on the merits, and are therefore declared admissible.

9.4 With regard to the author's allegation of violations of article 14, paragraphs 1 and 2, on the ground of improper instructions from the trial judge to the jury on the issues set out in para. 3.4 supra, and the admission of the confession statement and the police officers' testimony

into evidence, the Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the domestic courts to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties to review whether the judge's instructions to the jury and the conduct of the trial were in compliance with domestic law. As both parties also have pointed out, the Committee can, when considering alleged breaches of article 14 in this regard, solely examine whether the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or if the judge manifestly violated his obligation of impartiality. The material before the Committee and the author's allegations do not show that the trial judge's instructions or the conduct of the trial suffered from any such defects. Accordingly, this part of the communication is inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

9.5 With regard to the alleged violation of article 14, paragraph 3(e), on the ground that two named witnesses were willing to give evidence before the Court of Appeal but declined because of police intimidation, the Committee notes that the State party has disputed the author's allegations and that the author has not adduced any evidence in support of them, nor has he made any claims as to what new evidence these witnesses would provide. Furthermore, the material before the Committee shows that the author's counsel before the Court of Appeal, Lord Gifford, was granted an adjournment of 10 months in order to interview one of the potential witnesses and to obtain any other new evidence. However, at the hearing, Lord Gifford did not mention any police intimidation of defence witnesses. In the circumstances, the Committee finds that the claim is inadmissible under article 2 of the Optional Protocol for lack of substantiation.

9.6 The Committee declares the remaining claims under article 14 admissible, and proceeds with the examination of the merits of all admissible claims, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

10.1 The author has claimed a violation of articles 7 and 10, paragraph 1, on the ground of the conditions of detention to which he was subjected while detained at St. Catherine's District Prison. To substantiate his claim, the author has invoked three NGO reports specified in para. 3.2 supra. The Committee notes that the author refers to the inhuman and degrading prison conditions in general, such as the complete lack of mattresses, other bedding and furniture in the cells; that there is a desperate shortage of soap, toothpaste and toilet paper; that the quality of food and drink is very poor; that there is no integral sanitation in the cells and open sewers and piles of refuse; that there is no doctor, leaving warders with very limited training to treat medical problems. In addition to the NGO reports, counsel makes reference to reports from prisoners, stating that the prison is infested by vermin, and that the kitchen and the bakery despite having been condemned for many years are still in regular use. In addition to these claims, the author has also made specific allegations that he is confined to his cell for 22 hours every day in enforced darkness, isolated from other men, without anything to keep him occupied.

10.2 The Committee notes that with regard to these allegations, the State party has disputed only that there is inadequate medical facilities, that the prison is infested with vermin and that the kitchen and bakery have been condemned. The rest of the allegations put forward by the author stand undisputed and, in the circumstances, the Committee finds that article 10, paragraph 1, has been violated.

10.3 With regard to the author's claim that, on 5 March 1997, he was beaten by several warders at St. Catherine's District Prison, the Committee notes that the State party in its investigations of the allegations found that the beating was unavoidable as the author and three inmates had failed to follow repeated instructions to leave a particular cell. However, the Committee also notes the medical report provided by the State party which reveals that the author sustained injuries to his head, back, chest and legs which appear to go beyond that which is necessary to forcefully remove someone from a cell. The Committee therefore concludes that excessive force was used, in violation of articles 7 and 10, paragraph 1, of the Covenant.

10.4 The author has alleged that articles 7 and 10, paragraph 1, were violated also because of "continuing uncertainty" with regard to the non-parole period to be served by the author. The Committee notes that there appears to be agreement between the parties that upon the commutation of the author's sentence, he is subject to a non-parole period of seven years. Neither of the parties have, however, provided the Committee with a copy of a decision to this effect. The Committee notes that the State party claims that there is no uncertainty as to when this period begins to run, but that it does not in fact explicitly state on which date the period began to run in the author's case. However, based on the cited legislation and the State party's explanation, it does seem clear that when it is not otherwise decided, the non-parole period does not start to run any later than on the date of his commutation. The Committee cannot see that any uncertainty the author may experience as to whether the period started to run on that date or at any time prior to that, can constitute cruel, inhuman or degrading treatment or punishment in violation of the Covenant.

10.5 With regard to the alleged violation of article 14, paragraphs 1, 2, 3(b), 3(d) and 5, on the ground that the author was not effectively represented on appeal, the Committee notes that it is correct as stated by counsel that the Committee in its prior jurisprudence has found violations of article 14, paragraphs 3(d) and 5, in situations where counsel has abandoned all grounds of appeal and the court has not ascertained that this was in compliance with the wishes of the client. This jurisprudence does not, however, apply to this case, in which the Court of Appeal, according to the material before the Committee, did ascertain that the applicant had been informed and accepted that there were no arguments to be made on his behalf. In this regard, the Court of Appeal states:

> "Lord Gifford, QC informed the court that notwithstanding his best efforts he was still firmly of the view that there was nothing he could urge on behalf of the applicant and that he had further informed the applicant accordingly and that he had accepted the advice of counsel."

10.6 The Committee also notes that a letter of 27 December 1995 from Lord Gifford to the author's present counsel, which is appended to the author's original submission, implies that the Court of Appeal's judgment gave a correct account of the events, as he states that he, over a period of about a year, on several occasions discussed the case with the author and informed him that he could see no merit in the appeal unless they came up with new evidence. He also invited the author to get a second opinion. However, even if the situation, as alleged by the author, was that he had not accepted his counsel's advice, this cannot be attributed to the State party. Nor can the Committee find anything else in the material before it to suggest that the lawyer's conduct was incompatible with the interests of justice. In this regard, the Committee notes, as

opposed to what has been claimed by the author, that a 10 month adjournment was given in order to obtain new evidence, but that the counsel failed to secure any new evidence in that period. In the view of the Committee, this again cannot be attributed to the State party, and it concludes that there has been no violation of article 14, paragraphs 3(d) and 5, on this ground.

10.7 While recognizing that in order for the right to review of one's conviction to be effective, the State party must be under an obligation to preserve sufficient evidential material to allow for such a review, the Committee cannot see, as implied by counsel, that any failure to preserve evidential material until the completion of the appeals procedure constitutes a violation of article 14, paragraph 5. Article 14, paragraph 5, will, in the view of the Committee, only be violated where such failure prejudices the convict's right to a review, i.e. in situations where the evidence in question is indispensable to perform such a review. It follows that this is an issue which it is primarily for the appellate courts to consider.

10.8 In the present case, the State party's failure to preserve the original confession statement was made one of the grounds of appeal before the Judicial Committee of the Privy Council which, nevertheless, found that there was no merit in the appeal and dismissed it without giving further reasons. The Human Rights Committee is not in a position to re-evaluate the Judicial Committee's finding on this point, and finds that there was no violation of article 14, paragraph 5, in this respect.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7 and 10, paragraph 1, of the International Covenant on Civil and Political Rights.

12. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Robinson with an effective remedy, including compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State Party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] See paras. 5.1, 6.1 and 7.1 below.

[2] The author does not claim that he was forced to sign the statement. He claims that a confession was never made, and that the statement submitted by the prosecution was forged.

[3] There is nothing in the file which indicates any earlier mention of such contrary instructions from the author.

[4] Communication Nos. 210/1986 & 225/1987, Pratt and Morgan v. Jamaica, Views adopted on 6 April 1989.

[5] A newsletter for friends of prisoners on death row in the Caribbean.

[6] Communication No. 250/1987, Reid v. Jamaica, Views adopted on 20 July 1990; Communication No. 253/1987, Kelly v. Jamaica, Views adopted on 8 April 1991; Communication No 356/1989, Collins v. Jamaica, Views adopted on 25 March 1993.

[7] Communication No. 639/1995, Views adopted on 28 July 1997.

[8] Communication No. 639/1995, Walker and Richards v. Jamaica,Views adopted on 28 July 1997; Communication No. 749/1997, Taggart v. Jamaica, Views adopted on 31 March 1998.

[9] Communication No. 635/1995, Views adopted on 27 July 1998.

[10] Communication No. 672/1995, Views adopted on 29 July 1998.

[11] There is no mention of by who or in which context the interview was done.

[12] See, inter alia, the Committee's Views on communication No. 588/1994, Errol Johnson v. Jamaica, adopted on 22 March 1996.

APPENDIX

Individual opinion by member Louis Henkin

I concur in the conclusion of the Committee (paragraph 9.3) that, according to the jurisprudence of the Committee as formulated in previous cases, the circumstances of this case do not constitute a violation by the State party of article 7 of the Covenant.

Like several of my colleagues, I continue to be troubled by the Committee's formulation of the relevant principles, but do not consider the present case to be an appropriate vehicle for re-examining and reformulating them.

(Signed) Louis Henkin

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

L. Communication No. 759/1997, Osbourne v. Jamaica
(Views adopted on 15 March 2000, sixty-eighth session)*

Submitted by	George Osbourne (represented by S. Lehrfreund of the London law firm Simons Muirhead and Burton)
Alleged victim	The author
State party	Jamaica
Date of communication	12 June 1997 (initial submission)
Prior decision	Special Rapporteur's rule 86/91 Request transmitted to the State party on 23 June 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 March 2000,

Having concluded its consideration of communication No. 759/1997 submitted to the Human Rights Committee by Mr. George Osbourne under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following

Views under article 5, paragraph 4, of the Optional Protocol

1 The author of the communication is George Osbourne, a Jamaican national currently detained at the General Penitentiary, Kingston, Jamaica. He claims to be a victim of a violation by Jamaica of articles 7 and 10, paragraph 1, of the International Covenant of Civil and Political Rights. He is represented by Mr. Saul Lehrfreund of the London law firm Simons Muirhead and Burton.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

The facts as submitted by the author

2.1 In October 1994, the author was convicted by the Westmoreland Circuit court, Savannah-la-Mar, along with a co-accused for illegal possession of firearm, robbery with aggravation and wounding with intent. He is serving a sentence of 15 years' imprisonment with hard labour and is subject to receive 10 strokes of the tamarind switch.

2.2 The author's appeal against the conviction and the sentence was heard and dismissed on 5 September 1995. Counsel claims that there is no known record of proceedings before the Court of Appeal, and that no reasons for dismissal were given in writing.

2.3 Counsel contends that the applicant is unable to pursue a constitutional motion before the Supreme (Constitutional) Court of Jamaica because he has no private means and is not entitled to any form of legal aid for such a motion. Counsel cites decisions by the Human Rights Committee which have consistently rejected the Jamaican Government's contention that an applicant under the Optional Protocol must pursue a Constitutional motion before the Supreme (Constitutional) Court of Jamaica in order to exhaust domestic remedies.

The complaint

3.1 The author submits that the use of the tamarind switch as a form of punishment is inherently cruel, inhuman and degrading and therefore in violation of article 7 of the Covenant.[1]

3.2 Counsel states that the basic provision for flogging and whipping in Jamaica is preserved by the Constitution of Jamaica 1962. The relevant statutory provisions governing flogging and whipping are the Flogging Regulation Act 1903, the (Prevention of) Crime Act, 1942 and the Approval and Directions under section 4 thereof, dated 26 January 1965. It is claimed that in the absence of regulations more extensive than those set out in the Approval and Directions, the actual procedure used appears to be largely at the discretion of the implementing prison authorities. In this context, counsel refers to the affidavit of E.P., formerly incarcerated in the General Penitentiary, Kingston, Jamaica.

3.3 In his affidavit, Mr. E.P. states that on 8 August 1994 after pleading guilty to wounding with intent, he was sentenced to four years hard labour and six strokes of the tamarind switch. He was scheduled for release on 1 March 1997 after being granted one-third remission of his sentence for good behaviour. The day before his release, a batch of more than 12 correctional officers came and took him from his cell to another section of the prison. When he realized that the sentence of flogging was about to be carried out, he protested, with the result that he was hit in the stomach by one of the officers. He was then seized, blindfolded and ordered to remove clothing from the lower part of his body. When this was done, he was forced to lean forward across a barrel and one of the warders placed his penis into a slot in the barrel. He was then strapped into that position and struck across the buttocks with an instrument that he was unable to see. E.P. states that an unnecessary number of prison warders (25) were present at the time of the whipping and that this added to his humiliation. He further states that the doctor was the only outsider present and that he was not examined by the doctor after the whipping.

3.4 It is further submitted that the specific features of the regulation of whipping in Jamaica as shown in the case of E.P., including delay between sentence and execution causing additional anguish, the humiliating number and identity of witnesses to the punishment, no provision for the attendance by witnesses on behalf of the prisoner and the humiliation of being strapped naked to a barrel, aggravate the humiliation inherent in the punishment.

3.5 Counsel states that corporal punishment has not been practised in Jamaica in 25 years up to 1994, and contends that if a rising incidence of serious crime in Jamaica is advanced as justification for the reintroduction of corporal punishment, the empirically established lack of deterrence destroys this justification. Counsel further notes that by regulation 9 of the Flogging Regulation Act 1903 "in no case shall a sentence of flogging be passed upon a female." He contends that if deterrence of crime were the purpose of the provision, such an exception would not arise.

The State party's submission and counsel's comments thereon

4.1 In its submission of 28 August 1997, the State party challenges the admissibility of the communication under article 5, paragraph 2, of the Optional Protocol, claiming that domestic remedies have not been exhausted as the author has not petitioned the Judicial Committee of the Privy Council.

4.2 Without prejudice to its response on admissibility, the State party also responds to the merits by simply stating that it denies that articles 7 and 10 were breached by the imposition of a sentence of flogging on the author, as the relevant legislation, e.g. the Flogging Regulation Act and the Crime (Prevention) Act, are protected from unconstitutionality by Section 26 of the Constitution.

5.1 In his submission dated 13 November 1997, the author contends that the State party's observations are wrong and that the communication is admissible. In this regard, counsel states that there is no known record of the proceedings before the Court of Appeal on 25 September 1995, and that no reason for the dismissal of the appeal was given in writing. Furthermore, counsel points out that the author did not petition the Privy Council on the advice of Counsel, Mr. Hugh Davies. It is stated that Mr. Davies was requested to advise on the merits of an application for Special Leave to Appeal to the Judicial Committee of the Privy Council. In his advice, a copy of which has been made available to the Committee, he explains that the constitutionality of the sentence could only be contested through a constitutional motion before the relevant Jamaican courts, a motion which London counsel were not in a position to forward. With this background, the author was advised by Mr. Davies that there was no reasonable prospect of leave to appeal being granted.

5.2 The author also submits that a constitutional motion to the Supreme Court of Jamaica was not an available remedy in this case. Counsel argues that the lack of private funding and the unavailability of legal aid or lawyers willing to undertake such representation without payment inhibited the pursuit of such a motion which, given the complexity of the Constitution as a legal document, clearly required expert legal representation to establish a reasonable prospect of

success. In conclusion, it is submitted that on account of lack of legal aid the remedy before the Constitutional Court of Jamaica was not available to the author and that the domestic remedies must therefore be taken to be exhausted.

5.3 With regard to the merits of the case, counsel submits that the State party's reference to its constitution cannot in itself protect the sentence from challenge of a violation of articles 7 and 10, paragraph 1, of the Covenant.

New claim submitted by the author

6.1 In his letter of 6 January 1998, the author forwards a new claim that, on 13 December 1997, he was beaten severely by three warders at the General Penitentiary in Kingston.

6.2 The author states that on 13 December 1997, he was stabbed in the back with a knife by an inmate after having been attacked by him and three other inmates. Upon notifying a warder of the stabbing, the author was sent to see a named corporal, who allegedly asked the author to identify the assailants. The author states that he pointed out three of the assailants, and that the corporal recovered two knives and one icepick from them and then started beating the inmate who had admitted to stabbing the author. However, after having been beaten for a while, the inmate allegedly claimed that the author had provoked the stabbing by first attacking him with a knife. The author states that this was not true, but the corporal nonetheless started beating him. Two other warders allegedly joined him, and the author was beaten until he fell unconscious. He claims that he remembers blood running through his nose and mouth, and that he remained unconscious until he woke up in a vehicle on its way to the Kingston Public Hospital.

6.3 The author states that as a result of the beating, he suffered internal bleeding and that he was treated for this at the hospital until 16 December 1997. He claims that on 15 December 1997, he was visited by some policemen from Elliston Road Police Station who took a statement from him. He also claims that after his discharge from hospital, he gave a statement to an assistant of the Superintendent of the prison, but that all subsequent requests to see the Superintendent have been denied.

6.4 The author's letter was sent to the State party, with a request for comments, in order to enable the Committee to deal with all claims in the same procedure.

The State party's submission concerning the new claim

7.1 In its Note of 2 November 1998, the State party states that the Department of Correctional Services had been requested to investigate the new claims, and that the results of its investigation would be communicated to the Committee upon receipt.

7.2 In its submission of 17 May 1999, the State party forwards the results of its investigations and denies that any breaches of the Covenant had occurred. The State party submits that an injury report from the Tower Street Adult Correctional Centre, dated 13 December 1997, indicates that the author was stabbed by another inmate, and that he was taken to the institution's hospital for initial treatment, before he was referred to the Kingston Public Hospital where he

remained hospitalized until 15 December 1997. A medical report from Dr. N. Graham, General Surgeon at the Kingston Public Hospital, a copy of which is attached to the State party's submission, states that the author "had no loss of consciousness, no dyspnea nor did he vomit or spat blood." Furthermore, the report states that his injuries consisted of a stab wound to the chest. There is no mention of injuries received as results of beatings.

7.3 The State party further states that the Staff Officer in question ("the corporal") denies having used any force against the author on the date in question. He only admits to having questioned him on whether he had a knife in his possession. Another warder who was present during the alleged incident also admits to having questioned the author whether he had a knife. Allegedly, this warder states that the author was questioned because the prison authorities suspected that he had a knife in his possession, and admits that some force was used in attempting to retrieve the knife. However, he states that the use of force did not last very long, on account of the author's injuries. This warder cannot recall whether the previously mentioned Staff Officer was in the vicinity at the time.

7.4 In conclusion, based on its investigation, the State party submits that the Staff Officer ("the corporal") did not beat the author on 13 December 1997. The State party admits that, while attempting to ascertain whether the author had a knife in his possession, some force was used against him, but it states that the force used was not excessive and not to the extent alleged by the author. It is further submitted that the medical report provides evidence that excessive force was not used, because of the absence of injuries other than those caused by the stabbing incident.

Admissibility consideration and examination of the merits

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the State party has contested the admissibility of the original claim, contending that domestic remedies have not been exhausted since the author has not petitioned the Judicial Committee of the Privy Council. The Committee recalls its constant jurisprudence that for purposes of article 5, paragraph 2(b), of the Optional Protocol, domestic remedies must be both effective and available. With respect to the author's possibility of challenging the legitimacy of the sentence imposed on him, the Committee notes counsel's assertion that such a challenge could only be lodged as a constitutional motion before the Jamaican courts, and that a petition to the Judicial Committee of the Privy Council on this point thus would have no prospect of success. The Committee also notes that in its observations on admissibility, the State party merely in a single sentence claims that the Privy Council could have been petitioned, without elaborating on whether this would be an effective and available remedy, and without commenting on counsel's assertions in this regard. In the circumstances, the Committee holds that petitioning the Judicial Committee of the Privy Council would not have constituted an available and effective remedy for purposes of article 5, paragraph 2(b), of the Optional Protocol.

8.3 With regard to the author's possibility of filing a constitutional motion, the Committee notes that this issue has not been commented by the State party and considers, in view of its constant jurisprudence, that in the absence of legal aid, a constitutional motion was not an available and effective remedy in the present case. In conclusion, the Committee finds that it is not precluded by article 5, paragraph 2(b), of the Optional Protocol from considering the original claim.

8.4 Noting that the State party has not contested the admissibility of the new claim, the Committee also declares this claim admissible, and proceeds with the examination of the merits of the admissible claims, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

9.1 The author has claimed that the use of the tamarind switch constitutes cruel, inhuman and degrading punishment, and that the imposition of the sentence violated his rights under article 7 of the Covenant. The State party has contested the claim by stating that the domestic legislation governing such corporal punishment is protected from unconstitutionality by section 26 of the Constitution of Jamaica. The Committee points out, however, that the constitutionality of the sentence is not sufficient to secure compliance also with the Covenant. The permissibility of the sentence under domestic law cannot be invoked as justification under the Covenant. Irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant. The Committee finds that by imposing a sentence of whipping with the tamarind switch, the State party has violated the author's rights under article 7.

9.2 With regard to the author's claim that, on 13 December 1997, he was beaten severely by three warders of the General Penitentiary in Kingston, the Committee notes that the State party in its investigations of the allegations found that the warders had not exercised more force than that which was necessary to ascertain whether the author was in possession of a knife. Furthermore, the State party has provided the Committee with copies of medical reports which contain no mention of the injuries which the author claims to have sustained as a result of the alleged beatings. Based on the material before it, the Committee therefore cannot find a violation of the Covenant on this ground.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 7 of the International Covenant on Civil and Political Rights.

11. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Osbourne with an effective remedy, and should compensate him for the violation. The State party is also under an obligation to refrain from carrying out the sentence of whipping upon Mr. Osbourne. The State party should ensure that similar violations do not occur in the future by repealing the legislative provisions that allow for corporal punishment.

12. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The Committee wishes to receive from the State Party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Reference is made to the Zimbabwean decisions of S.V. Ncube and others, and S.V. A Juvenile, a decision from Barbados, Hobbs and Mitchell v. R. and a judgement of the European Court of Human Rights, Tyrer v. United Kingdom.

M. Communication No. 760/1997, J.G.A. Diergaardt et al. v. Namibia
(Views adopted on 25 July 2000, sixty-ninth session)*

Submitted by:	Rehoboth Baster Community et al. (represented by Dr. Y. J. D. Peeters, their international legal counsel)
Alleged victim:	The authors
State party:	Namibia
Date of communication:	17 November 1996 (initial submission)
Date of admissibility decision:	7 July 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2000,

Having concluded its consideration of communication No. 760/1997 submitted to the Human Rights Committee by J.G.A. Diergaardt et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1 The authors of the communication are J.G.A. Diergaardt, Captain of the Rehoboth Baster Community,[1] D.J. Izaaks, Captain a.i. of the Rehoboth Baster Community, Willem van Wijk and Jan Edward Stumpfe, members of the Legislative Council of the Rehoboth Baster Community, Andreas Jacobus Brendell, Speaker of the Rehoboth Baster Community, and J. Mouton and John Charles Alexander McNab, members of the Rehoboth Baster Community.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. P.N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden, and Mr. Abdallah Zakhia. The text of seven individual opinions signed by eleven Committee members is appended to this document.

They present the communication on their own behalf and on behalf of the Rehoboth Baster Community and claim to be a victim of a violation by Namibia of articles 1, 14, 17, 25(a) & (c), 26 and 27 of the Covenant. They are represented by Dr. Y.J.D. Peeters, their international legal counsel.

The facts as submitted by the authors

2.1 The members of the Rehoboth Baster Community are descendants of indigenous Khoi and Afrikaans settlers who originally lived in the Cape, but moved to their present territory in 1872. They were governed by their 'paternal laws', which provided for the election of a Captain, and for rights and duties of citizens. At present, the community numbers some 35,000 people and the area they occupy (south of Windhoek) has a surface of 14,216 square kilometres. In this area the Basters developed their own society, culture, language and economy, with which they largely sustained their own institutions, such as schools and community centres.

2.2 Their independence continued throughout the German colonial reign of Namibia, and was recognized by South Africa when it became the mandatory for South West Africa. However, in 1924, because of disagreement among the Basters about an agreement concluded with South Africa concerning the administration of the district of Rehoboth, the South African government enacted proclamation No. 31 whereby all powers of the Captain, the courts and officials appointed by the Council, were transferred to the Magistrate and his Court, thereby suspending the agreement on self-government. In 1933, a gradual process of restoring some form of local government was introduced by the establishment of an Advisory Council, members of which were elected by the community.

2.3 By Act No. 56 of 1976, passed by the South African parliament, the Rehoboth people were granted "self-government in accordance with the Paternal Law of 1872". The law provided for the election of a Captain every five years, who appointed the Cabinet. Laws promulgated by the Cabinet had to be approved by a 'Volksraad' (Council of the people), consisting of nine members.

2.4 According to counsel, in 1989, the Rehoboth Basters accepted under extreme political pressure, the temporary transfer of their legislative and executive powers into the person of the Administrator-General of South West Africa, so as to comply with UN Security Council resolution nr.435 (1978). In the motion, adopted by the Council of Rehoboth on 30 June 1989, the Administrator General was requested to administer the territory as an agent of the Captain and not to make any law or regulation applicable to Rehoboth without consent of the Captain, the Cabinet and the Council; at the end of the mandate the Government of Rehoboth would resume authority. The proclamation by the Administrator-General on the transfer of powers of legislative authority and government of Rehoboth, of 30 August 1989, suspends the powers of the Legislative Council and the Captain's Council of Rehoboth "until the date immediately before the date upon which the territory becomes independent". It is therefore submitted that the effect of this transfer expired on the day before independence of Namibia, and that thus on 20 March 1990, the traditional legal order and Law 56 of 1976 were in force on the territory of Rehoboth. A resolution restoring the power of the Captain, his Council and the legislative Council was adopted by the Rehoboth People's Assembly on 20 March 1990. On 21 March 1990, Namibia became independent, and the Constitution came into force.

2.5 The authors submit that the Government of Namibia did not recognize their independence and the return to the status quo ante, but expropriated all communal land of the community through application of schedule 5 of the Constitution, which reads:

> (1) All property of which the ownership or control immediately prior to the date of independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1990) or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.
>
> ..."

According to the counsel, this has had the effect of annihilating the means of subsistence of the community, since communal land and property was denied.

2.6 On 22 June 1991, the Rehoboth people organized general elections for a Captain, Council and Assembly according to the Paternal Laws. The new bodies were entrusted with protecting the communal properties of the people at all cost. Subsequently, the Rehoboth Baster Community and its Captain initiated a case against the Government of Namibia before the High Court. On 22 October 1993 the Court recognized the community's locus standi. Counsel argues that this implies the recognition by the Court of the Rehoboth Basters as a people in its own right. On 26 May 1995, the High Court however rejected the community's claim to the communal property. On 14 May 1996, the Supreme Court rejected the Basters' appeal. With this, it is submitted that all domestic remedies have been exhausted.

2.7 On 28 February 1995, the International Covenant on Civil and Political Rights and the Optional Protocol thereto entered into force for Namibia.

The complaint

3.1 Counsel submits that the Government continues to confiscate the assets of the Rehoboth Basters, and that the Captain and other leaders and organizations were evicted from and deprived of the Captain's residence, the administrative offices, the community hall, the communal land and of the assets of the Rehoboth Development Corporation. Counsel submits that this policy endangers the traditional existence of the community as a collective of mainly cattle raising farmers. He explains that in times of drought (as at the time when the communication was submitted) the community needs communal land, on which pasture rights are given to members of the community on a rotating basis. The expropriation of the communal land and the consequential privatization of it, as well as the overuse of the land by inexperienced newcomers to the area, has led to bankruptcy for many community farmers, who have had to slaughter their animals. As a consequence, they cannot pay their interests on loans granted to them by the Development Corporation (which used to be communal property but has now been seized by the Government), their houses are then sold to the banks and they find themselves homeless.

Counsel emphasizes that the confiscation of all property collectively owned by the community robbed the community of the basis of its economic livelihood, which in turn was the basis of its cultural, social and ethnic identity. This is said to constitute a violation of article 27.

3.2 In this context, the authors claim to be victims of a violation by the Government of Namibia of article 1 of the Covenant. They point out that the Namibian High Court has recognised them as a distinct community with a legal basis. They claim that their right to self-determination inside the republic of Namibia (so-called internal self-determination) has been violated, since they are not allowed to pursue their economic social and cultural development, nor are they allowed to freely dispose of their community's national wealth and resources. By enactment of the law on regional government 1996, the 124 year long existence of Rehoboth as a continuously organised territory was brought to an end. The territory is now divided over two regions, thus preventing the Basters from effectively participating in public life on a regional basis, since they are a minority in both new districts. Counsel claims that this constitutes a violation of article 25 of the Covenant.

3.3 The authors further claim a violation of article 14 of the Covenant, since they were forced to use English throughout the court proceedings, a language they do not normally use and in which they are not fluent. Moreover, they had to provide sworn translations of all documents supporting their claims (which were in Afrikaans)at very high cost. They claim therefore that their right to equality before the Courts was violated, since the Court rules favour English speaking citizens.

3.4 In this context, counsel points out that article 3 of the Constitution declares English to be the only official language in Namibia. Paragraph 3 of this article allows for the use of other languages on the basis of legislation by Parliament. Counsel states that seven years after independence such a law has still not been passed, and claims that this constitutes discrimination against non-English speakers. According to counsel, attempts by the opposition to have such legislation enacted have been thwarted by the Government which has declared to have no intention to take any legislative action in this matter. In this connection, counsel refers to the 1991 census, according to which only 0.8 percent of the Namibian population uses English as mother tongue.

3.5 As a consequence the authors have been denied the use of their mother tongue in administration,[2] justice, education and public life. This is said to be a violation of their rights under articles 26 and 27 of the Covenant.

3.6 The authors further claim a violation of article 17 of the Covenant, since they and their cattle have been expelled from the lands which they held in collective property.

3.7 Counsel requests the Committee for interim measures of protection under rule 86 of the rules of procedure. He requests that the Committee demand that no expropriation, buying or selling of the community lands take place, that no rent be collected from tenants, and that no herds be prevented from grazing on the community lands while the communication is under consideration by the Committee.

The State party's observations and counsel's comments thereon

4 On 23 June 1997, the Committee, acting through its Special Rapporteur on New Communications, transmitted the communication to the State party, requesting information and observations, without however requesting interim measures of protection under rule 86.

5 By note of 6 November 1997, the State party confirmed that domestic remedies had been exhausted. The State party denied however, that it had violated international obligations. The State party submitted that it was prepared to supply any relevant information which the Committee might request, either orally or in writing.

6 In his comments on the State party's submission, counsel noted that the State party conceded that domestic remedies had been exhausted and that it did not adduce any other grounds on the basis of which the communication should be inadmissible. Counsel agreed that the matter should be considered on its merits.

The Committee's admissibility decision

7 At its 63rd session, the Committee considered the admissibility of the communication. It ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement. The Committee noted that the State party had confirmed that all domestic remedies had been exhausted.

8 Consequently, on 7 July 1998 the Committee found the communication admissible and decided that the question whether or not the State party has violated its obligations under the Covenant in the authors' case should be examined on the merits.

Further developments

9.1 On 3 August 1998, the Committee's decision on admissibility was transmitted to the State party, with the request that the State party provide written explanations or statements on the substance of the authors' claims. No information was received, despite two reminders sent to the State party.

9.2 On 28 January 1999, counsel for the authors informed the Committee that Mr. John Macnab had been elected Captain of the Rehoboth community. In a further letter, dated 25 April 1999, counsel informed the Committee that the community's water supply had been cut off. He reiterated his request for interim measures of protection.

Consideration of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee regrets that the State party has not provided any information with regard to the substance of the authors' claims. It recalls that it is implicit in the Optional Protocol that States parties make available to the Committee all information at its disposal. In the absence of a reply from the State party, due weight must be given to the authors' allegations to the extent that they are substantiated.

10.3 The authors have alleged that the termination of their self-government violates article 1 of the Covenant. The Committee recalls that while all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the community to which the authors belong is a "people" is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive.[3] As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular articles 25, 26 and 27.

10.4 The authors have made available to the Committee the judgement which the Supreme Court gave on 14 May 1996 on appeal from the High Court which had pronounced on the claim of the Baster community to communal property. Those courts made a number of findings of fact in the light of the evidence which they assessed and gave certain interpretations of the applicable domestic law. The authors have alleged that the land of their community has been expropriated and that, as a consequence, their rights as a minority are being violated since their culture is bound up with the use of communal land exclusive to members of their community. This is said to constitute a violation of Article 27 of the Covenant.

10.5 The authors state that, although the land passed to the Rehoboth Government before 20 March 1976, that land reverted to the community by operation of law after that date. According to the judgement, initially the Basters acquired for and on behalf of the community land from the Wartbooi Tribe but there evolved a custom of issuing papers (papieren) to evidence the granting of land to private owners and much of the land passed into private ownership. However, the remainder of the land remained communal land until the passing of the Rehoboth Self-Government Act No. 56 of 1976 by virtue of which ownership or control of the land passed from the community and became vested in the Rehoboth Government. The Baster Community had asked for it. Self-Government was granted on the basis of proposals made by the Baster Advisory Council of Rehoboth. Elections were held under this Act and the Rehoboth area was governed in terms of the Act until 1989 when the powers granted under the Act were transferred by law to the Administrator General of Namibia in anticipation and in preparation for the independence of Namibia which followed on 21 March 1990. And in terms of the

Constitution of Namibia, all property or control over property by various public institutions, including the Government of South West Africa, became vested in, or came under the control, of the Government of Namibia. The Court further stated:

> "In 1976 the Baster Community, through its leaders, made a decision opting for Self-Government. The community freely decided to transfer its communal land to the new Government. Clearly it saw advantage in doing so. Then in 1989, the community, through the political party to which its leaders were affiliated, subscribed to the Constitution of an independent Namibia. No doubt, once again, the Community saw advantage in doing so. It wished to be part of the new unified nation which the Constitution created. ... One aim of the Constitution was to unify a nation previously divided under the system of apartheid. Fragmented self-governments had no place in the new constitutional scheme. The years of divide and rule were over."

10.6 To conclude on this aspect of the complaint, the Committee observes that it is for the domestic courts to find the facts in the context of, and in accordance with, the interpretation of domestic laws. On the facts found, if "expropriation" there was, it took place in 1976, or in any event before the entry into force of the Covenant and the Optional Protocol for Namibia on 28 February 1995. As to the related issue of the use of land, the authors have claimed a violation of article 27 in that a part of the lands traditionally used by members of the Rehoboth community for the grazing of cattle no longer is in the de facto exclusive use of the members of the community. Cattle raising is said to be an essential element in the culture of the community. As the earlier case law by the Committee illustrates, the right of members of a minority to enjoy their culture under article 27 includes protection to a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, especially in the case of indigenous peoples.[4] However, in the present case the Committee is unable to find that the authors can rely on article 27 to support their claim for exclusive use of the pastoral lands in question. This conclusion is based on the Committee's assessment of the relationship between the authors' way of life and the lands covered by their claims. Although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture. Furthermore, although the Rehoboth community bears distinctive properties as to the historical forms of self-government, the authors have failed to demonstrate how these factors would be based on their way of raising cattle. The Committee therefore finds that there has been no violation of article 27 of the Covenant in the present case.

10.7 The Committee further considers that the authors have not substantiated any claim under article 17 that would raise separate issues from their claim under article 27 with regard to their exclusion from the lands that their community used to own.

10.8 The authors have also claimed that the termination of self-government for their community and the division of the land into two districts which were themselves amalgamated in larger regions have split up the Baster community and turned it into a minority with an adverse impact on the rights under Article 25(a) and (c) of the Covenant. The right under Article 25(a) is a right to take part in the conduct of public affairs directly or through freely chosen representatives and the right under Article 25(c) is a right to have equal access, on general terms of equality, to public service in one's country. These are individual rights. Although it may very

well be that the influence of the Baster community, as a community, on public life has been affected by the merger of their region with other regions when Namibia became sovereign, the claim that this has had an adverse effect on the enjoyment by individual members of the community of the right to take part in the conduct of public affairs or to have access, on general terms of equality with other citizens of their country, to public service has not been substantiated. The Committee finds therefore that the facts before it do not show that there has been a violation of article 25 in this regard.

10.9 The authors have claimed that they were forced to use English during the proceedings in court, although this is not their mother tongue. In the instant case, the Committee considers that the authors have not shown how the use of English during the court proceedings has affected their right to a fair hearing. The Committee is therefore of the opinion that the facts before it do not reveal a violation of article 14, paragraph 1.

10.10 The authors have also claimed that the lack of language legislation in Namibia has had as a consequence that they have been denied the use of their mother tongue in administration, justice, education and public life. The Committee notes that the authors have shown that the State party has instructed civil servants not to reply to the authors' written or oral communications with the authorities in the Afrikaans language, even when they are perfectly capable of doing so. These instructions barring the use of Afrikaans do not relate merely to the issuing of public documents but even to telephone conversations. In the absence of any response from the State party the Committee must give due weight to the allegation of the authors that the circular in question is intentionally targeted against the possibility to use Afrikaans when dealing with public authorities. Consequently, the Committee finds that the authors, as Afrikaans speakers, are victims of a violation of article 26 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide the authors and the other members of their community an effective remedy by allowing its officials to respond in other languages than the official one in a nondiscriminatory manner. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] On 10 May 1998, the Committee was informed about the passing away of Captain Diergaardt, and that Mr. D. Izaaks had been appointed acting chief.

[2] Counsel provides a copy of a circular issued by the Regional Commissioner, Central Region, Rehoboth, dated 4 March 1992, in which the use of Afrikaans during telephone conversations with regional public authorities is explicitly excluded.

[3] See the Committee's Views in case No. 167/1984 (Ominayak v. Canada), Views adopted on 26 March 1990.

[4] See, Kitok v. Sweden (197/1985), Ominayak v. Canada (167/1984), I. Lansman et al. v. Finland (511/1992), J. Lansman et al. v. Finland (671/1995), as well as General Comment No. 23 [50], para. 7.

APPENDIX

Individual opinion of Abdalfattah Amor (dissenting)

I cannot subscribe to the Committee's finding of a violation of article 26 of the Covenant, for the following reasons:

1. In article 3 of its Constitution, Namibia, which had declared its independence on 21 March 1991, made English the country's official language out of a legitimate concern to improve the chances of integration. It was thought that granting any privilege or particular status to one of the many other minority or tribal languages in the country would be likely to encourage discrimination and be an obstacle to the building of the nation. Since then, all languages other than English have been on an equal footing under the Constitution - no privileges, and no discrimination. It is the same for all languages, including Afrikaans, the introduction of which into Namibia was tied up with the history of colonization and which, in any case, ceased to be used as an official language on 21 March 1991.

2. Article 3 (3) of the Constitution of Namibia permits the use of other languages in accordance with legislation adopted by Parliament. No such legislation, which in any case could have no effect on the use of English as the official language, has yet been adopted. The guarantees it might have provided or the restrictions it might have introduced have not been decreed and as the situation is the same for everyone, no distinction could have been established legislatively in either a positive or a negative sense. Naturally this also applies to the Afrikaans language.

3. The use of minority languages as such has not been limited, far less questioned, at any level other than the official level. In their personal relationships, among themselves or with others, people speaking the same language are able to use that language without interference - which would be difficult to imagine anyway - from the authorities. In other words, there is nothing to limit the use of Afrikaans as the language of choice of the Basters in their relations between themselves or with others who know the language and agree to communicate with them in that language.

4. Whatever legislative weaknesses there may have been so far, the right to use one's mother tongue cannot take precedence, in relations with official institutions, over the official language of the country, which is, or which is intended to be, the language of all and the common denominator for all citizens. The State may impose the use of the common language on everyone, it is entitled to refuse to allow a few people to lay down the law. In other words, everyone is equal in relation to the official language and any linguistic privileges - unless they apply to all, in which case they would no longer be privileges - would be unjustifiable and discriminatory. The Basters complain that they are not able to use their mother tongue for administrative purposes or in the courts. However, they are not the only ones in this situation. The situation is exactly the same for everyone speaking the other minority languages. In support of their complaint, the Basters provide a copy of a circular issued by the Regional Commissioner of the Central Region of Rehoboth dated 4 March 1992, in which, according to their counsel, "the use of Afrikaans during telephone conversations with regional public authorities is explicitly excluded". This circular, although not very skilfully drafted, actually says something

else and, in any case, certainly says more than that. It deserved closer attention from the Committee, in order to avoid the danger of not seeing the wood for the trees and to prevent the specific problem from hiding the general solution. In that connection, it is important to remember the structure of this circular, which consists of a statement of fact, a reminder, a ban and a requirement:

- The statement of fact is that officials, in the course of their duties, continue to hold their official telephone conversations and to write official letters in Afrikaans;

- The reminder refers to the fact that on 21 March 1992 Afrikaans ceased to be the official language and that since then English has been the official language of Namibia. As a result, Afrikaans has the same official status as the other tribal languages, of which there are many;

- The ban is on the continuing use by State officials of Afrikaans in their replies, in the exercise of their official duties, to telephone calls and letters;

- The requirement is that all telephone calls and official correspondence should be carried out exclusively in English, the official language of Namibia.

In other words, State services must use English, and English only, and refrain from giving privileged status to any unofficial language. From this point of view, Afrikaans is neither more nor less important than the other tribal languages. This means that minority languages must be treated without discrimination. Consequently, there is no justification, unless one wishes to discriminate against the other minority languages and disregard article 3 of the Constitution of Namibia, for continuing to deal with the linguistic problem in a selective manner by favouring one particular language, Afrikaans, at the expense of the others. In that respect, the Regional Commissioner's circular does not reveal any violation of the principle of equality and certainly not of the provisions of article 26 of the Covenant.

5. All things considered, it is questionable whether there has been any violation of article 26 of the Covenant in the case in point, and the Committee has, in the belief that it was denouncing discrimination, given the impression that it has, rather, granted a privilege - that it has, in short, undermined the principle of equality as expressed in article 26 of the Covenant. That being the case, the reasons for giving this individual opinion will be apparent.

(Signed) A. Amor

[Done in English, French and Spanish, the French text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Nisuke Ando (dissenting)

I am unable to agree with the Committee's Views that the authors in this case are victims of a violation of article 26 of the Covenant because the State party has instructed its civil servants not to reply to their written or oral communications with the authorities in the Afrikaans language. Article 26 provides for everyone's right to equality before the law as well as to equal protection of the law without discrimination. It further provides that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language etc."

Certainly the instruction in question will put a great burden on speakers of Afrikaans in their official correspondence with the authorities. However, according to the circular by which the instruction is given, "All phone calls and correspondence should be treated exclusively in English which is the official language of the Republic of Namibia" and Afrikaans which "was for a very long time the official language ... now officially enjoys the same status as other tribal languages." In other words, now that English has become the official language of the State party, civil servants shall "refrain from using Afrikaans when responding to phone calls and ... correspondence."

Nevertheless, it is undoubtedly clear that the instruction puts the Afrikaans language exactly on the same footing as any other native languages spoken in Namibia, thus guaranteeing Afrikaans equal treatment without discrimination. Of course English is treated differently from all native languages including Afrikaans, but considering that each sovereign State may choose its own official language and that the official language may be treated differently from non-official languages, I conclude that this differentiation constitutes objective and reasonable distinction which is permitted under article 26.

My concern with respect to this instruction is whether it might unduly restrict communication between Namibian population and its authorities by apparently prohibiting not only written but also oral correspondence in any tribal language. This may raise issues under article 19, although I prefer to reserve my position on the subject in this particular case.

(Signed) N. Ando

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of P.N. Bhagwati, Lord Colville, and Maxwell Yalden (dissenting)

We find ourselves unable to agree with the view taken by some of our colleagues in regard to the applicability of article 19, paragraph 2, and article 26 of the Covenant, though we do agree with them so far as articles 17, 25 and 27 are concerned. Our reasons for taking a different view from that taken by our other colleagues are the following:

Re: article 19 paragraph 2

1. So far as the alleged violation of article 19, paragraph 2 is concerned, it may be pointed out that when the admissibility decision was given by the Committee on 7 July 1998, the Committee declared the communication admissible without specifying what were the articles of the Covenant which appeared to have been violated. The only question raised in the admissibility decision was whether or not the State party had violated its obligations under the Covenant. However, the Complaint in the communication which was sent to the State party related only to violation of articles 17, 25, 26 and 27 of the Covenant. The communication did not allege violation of article 19, paragraph 2, and the State party was therefore not called upon to meet the challenge of article 19, paragraph 2. We do not therefore think that it would be right for the Committee to make out a case of violation of article 19, paragraph 2, when that was not the case put forward by the authors in the communication. We can appreciate that if the authors had not claimed violation of any particular articles of the Covenant but had made a general complaint of violation by the State party of its obligations under the Covenant on the facts alleged in the communication, the Committee might have been justified in holding that on the facts as found by it, any particular article or articles of the Covenant were violated. But when specific articles of the Covenant were relied upon by the authors in the communication, especially when advised by counsel, we do not think that it would be right for the Committee to make out a new case for the authors.

2. Moreover, we find that the only allegation in the communication as set out in paragraphs 3(4) and 3(5) is that the authors were denied "the use of their mother tongue in administration, justice, education and public life." In our view this allegation does not make out a case of violation of article 19, paragraph 2. So far as the administration is concerned, English being the official language of the State party, it is obvious that no other language could be allowed to be used in the administration or in the Courts or in public life. The authors could not legitimately contend that they should be allowed to use their mother tongue in administration or in the Courts or in public life, and the insistence of the State party that only the official language shall be used cannot be regarded as violation of their right under article 19, paragraph 2. In regard to the use of Afrikaans, the mother tongue of the authors, in education there is nothing to show that the authors were not allowed to use Afrikaans in the schools or colleges run by them and this allegation of violation of article 19 paragraph 2 also therefore remains unsubstantiated.

3. Of course, the authors might have argued that their language rights under Article 27 were being denied, and this allegation could then have been examined by the Committee; however, this is hypothetical, as in fact their Article 27 submission related entirely to land use

(paragraphs 10.4 and 10.6), and not to language. In the circumstances, as has just been suggested in respect of Article 19, paragraph 2, it is not for the Committee to construct a case on this ground under Article 27, in the absence of a complaint from the authors.

4. The majority members of the Committee have relied on the circular of the Regional Commissioner but we do not think that the circular in any way supports the claim of violation of article 19 paragraph 2. The circular is in the following terms:

> "It has come to the attention of the office of the Regional Commissioner that some Government officials handle (answer) official phone calls and correspondence in Afrikaans contrary to the Constitutional provision that Afrikaans ceased to be the official language in this country after 21 March 1990.
>
> While it is understood that Afrikaans was for a very long time the official language, it now officially enjoys the same status as other tribal languages.
>
> All employees of the Government are thus advised to, in future, refrain from using Afrikaans when responding to phone calls and their correspondence.
>
> All phone-calls and correspondence should be treated exclusively in English which is the official language of the Republic of Namibia."

It is clear from the first paragraph of the circular that it is intended to apply only in relation to "official phone calls and correspondence" handled by Government officials. The circular points out that the handling of official phone calls and correspondence in Afrikaans was alright when Afrikaans was the official language of the territory of the State, but since English has now become the official language, Afrikaans is in the same position as other tribal languages and consequently official phone calls and correspondence should be responded to by Government employees only in English, which is the official language and not in Afrikaans.

5. We fail to see how the circular can be construed as imposing any restriction on the right to freedom of expression and to freedom to receive and impart information. When English is the official language of the State, it is legitimate for the State to insist that all official phone calls and correspondence should be responded to by Government officials in the official language, namely English, and not in Afrikaans. The advice given by the Government to its officials not to use Afrikaans, which has ceased to be the official language, but to use only English, which has now become the official language, is confined only to official phone calls and official correspondence and does not prevent any Government official from carrying on any conversation or correspondence which is private and not of an official character. If any other view were taken, namely that anyone in the territory of a State is entitled to carry on any official conversation or correspondence with a Government official in any language other than the official language of the State and that Government official is free to respond to such conversation or correspondence in that language, it would create a chaotic situation because there would, in that event, be multiplicity of languages in the official records of the State. The whole object of making a particular language as the official language of the State would be defeated. We are therefore of the view that the circular in question does not in any way violate article 19, paragraph 2 of the Covenant.

6. The suggestion implicit in the argument of the authors as set out in paragraphs 3(4) and 3(5) is that the State party should have languages as Afrikaans in administration, Courts, education and public life and that the absence of such legislation in the context of making English the official language was violative of the Covenant. But this suggestion overlooks the fact that it is for a State party to decide what shall be its official language and it is not competent to the Committee to direct the State party to adopt any other language or languages as official language or languages of the State. Once a State party has adopted any particular language or languages as its official language or languages, it would be legitimate for the State party to prohibit the use of any other language for official purposes and if the State party does so, its action cannot be branded being in violation of article 19, paragraph 2.

Re article 26

7. We are also of the view that the circular does not violate article 26. Article 26 is a free-standing guarantee of equality and strikes at discrimination. The only argument which seems to have been advanced by the authors in paragraphs 3(4) and 3(5) in support of its claim of violation of article 26 is that by reason of English being declared as the only official language of the State and the failure of the State to enact legislation allowing the use of other languages, the authors have been denied the use of their mother tongue in administration, justice, education and public life. This argument has already been rejected by us while dealing with article 19, paragraph 2, and the same reasoning must apply in relation to the challenge under article 26. It is significant to note that it is nowhere alleged in the communication that the action of the State in declaring English as the official language and not allowing the use of other languages was directed only against the use of Afrikaans while permitting the other languages to be used. The action of the State in declaring English as the official language and not allowing the use of other languages by enacting appropriate legislation was clearly not violative of article 26 because all languages other than English were treated on the same footing and were not allowed to be used for official purposes and there was no discrimination against Afrikaans vis-à-vis other languages.

8. The reliance on the circular referred to above would also not help the authors to substantiate their claim under article 26. The circular is clearly intended to provide that all official phone calls and correspondence should be treated exclusively in English, which is the official language of the State. That is the thrust, the basic object and purpose of the circular and it is in pursuance of this object and purpose that the circular directs that the Government officials should refrain from using Afrikaans when responding to official phone calls and correspondence. The circular refers specifically only to Afrikaans and seeks to prohibit its use by Government officials in official phone calls and correspondence, because the problem was only in regard to Afrikaans which was at one time, until replaced by English, the official language and which continued to be used by Government officials in official phone calls and correspondence, though it had been ceased to be the official language of the State. There was apparently no problem in regard to the tribal languages because they were at no time used in administration or for official business. But Afrikaans was being used earlier for official purposes and hence it became necessary for the State to issue the circular prohibiting the use of Afrikaans in official phone calls and correspondence. That is why the circular specifically referred only to Afrikaans and not to the other languages. This is also evident from the statement in the circular that Afrikaans

now enjoys the same status as other tribal languages. It is therefore not correct to say that the circular singled out Afrikaans for unfavourable treatment as against other languages in that there was hostile discrimination against Afrikaans. We consequently hold that there was no violation of the principle of equality and non-discrimination enshrined in article 26.

9. We therefore hold, contrary to the conclusion reached by some of our colleagues, that there was no violation of article 19 paragraph 2 or article 26 committed by the State party.

(Signed) P.N. Bhagwati

(Signed) Lord Colville

(Signed) M. Yalden

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Elizabeth Evatt, Eckart Klein, David Kretzmer and Cecilia Medina Quiroga (concurring)

We agree with the Committee's Views in this matter. However, we consider that the instruction given by the State party to civil servants not to respond in the Afrikaans language, even if they have the personal capacity to do so, restricts the freedom of the authors to receive and impart information in that language (art. 19, para. 2 of the Covenant). In the absence of a justification for this restriction, which meets the criteria set out in paragraph 3 of article 19, we consider that there has been a violation of the authors' right to freedom of expression under article 19 of the Covenant.

(Signed) E. Evatt

(Signed) E. Klein

(Signed) D. Kretzmer

(Signed) C. Medina Quiroga

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Elizabeth Evatt and Cecilia Medina Quiroga (concurring)

It is clear on the facts and from the 1996 decision of the High Court that the ownership of the communal lands of the community had been acquired by the government of Namibia before the coming into force of the Covenant and the Optional Protocol and that the authors cannot substantiate a claim on the basis of any expropriation. However, the significant aspect of the authors' claim under article 27 is that they have, since that date, been deprived of the use of lands and certain offices and halls that had previously been held by their government for the exclusive use and benefit of members of the community. Privatization of the land and overuse by other people has, they submit, deprived them of the opportunity to pursue their traditional pastoral activities. The loss of this economic base to their activities has, they claim, denied them the right to enjoy their own culture in community with others. This claim raises some difficult issues as to how the culture of a minority which is protected by the Covenant is to be defined, and what role economic activities have in that culture. These issues are more readily resolved in regard to indigenous communities which can very often show that their particular way of life or culture is, and has for long been, closely bound up with particular lands in regard to both economic and other cultural and spiritual activities, to the extent that the deprivation of or denial of access to the land denies them the right to enjoy their own culture in all its aspects. In the present case, the authors have defined their culture almost solely in terms of the economic activity of grazing cattle. They cannot show that they enjoy a distinct culture which is intimately bound up with or dependent on the use of these particular lands, to which they moved a little over a century ago, or that the diminution of their access to the lands has undermined any such culture. Their claim is, essentially, an economic rather than a cultural claim and does not draw the protection of article 27.

(Signed) E. Evatt

(Signed) C. Medina Quiroga

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Rajsoomer Lallah (dissenting)

1. I am unable to agree with the finding of the Committee (paragraph 10.10) that there has been a violation of Article 26 the Covenant.

2. I agree that, since the State party has not provided any explanations on the merits of the complaint, the Committee must give due weight to the allegations of the authors. However, where inferences are to be drawn from the material provided by the authors, these inferences must clearly be legitimate and must be seen in the context of the complaints made.

3. The material allegations of the authors with regard to this particular complaint are set out in paragraph 3.4 and 3.5. The authors complain of a violation of Articles 26 and 27. They have also provided the Committee with a copy of the circular advising civil servants not to respond to official phone calls and correspondence in Afrikaans and to do so in the official language. It is perhaps useful to reproduce the circular so that it may be seen in its proper perspective. The circular reads as follows:

Office of the Regional Commissioner
Central Region

4 March 1992

CIRCULAR

1. It has come to the attention of the office of the Regional Commissioner that some Government officials handle (answer) official phone calls and correspondence in Afrikaans contrary, to the Constitutional provision that Afrikaans ceased to be the official language in this country after 21 March 1990.

2. While it is understood that Afrikaans was for a very long time the official language, it now officially enjoys the same status as other tribal languages.

3. All employees of the Government are thus advised to, in future, refrain from using Afrikaans when responding to phone calls and their correspondence.

4. All phone-calls and correspondence should be treated in English which is the official language of the Republic of Namibia.

Thank you for your cooperation.

N. Angermund
Regional Commissioner Central

4. It is to be noted that the date of the circular is 4 March 1992 whereas the Covenant and the Optional Protocol came into force for Namibia on 28 February 1995. I proceed on the assumption, in the absence of any explanation from the State party, that the circular is still operative.

5 It is to be observed that the authors claim a violation of Article 27, in addition to Article 26. The Committee presumably found no violation of Article 27 which, inter alia, deals with the right of linguistic minorities not to be denied the right, in community with the other members of their group, to use their own language. Indeed, it would be stretching the language of Article 27 too far to suggest, as the Committee might in effect be perceived to have done, that public authorities must make it possible to use a non- official language (Afrikaans) in official business when the official language is different. In this regard it is to be observed that the Committee itself finds in paragraph 10.9 that the authors have not shown how the use of English during Court proceedings has affected their right to a fair hearing. And a fair hearing requires that a person understands what is happening in court so as to brief his or her legal representative appropriately in the conduct of his or her case.

6 But it may very well be said that the gravamen of the reasoning of the Committee lies in that part of the finding which is to the effect that the circular is "targeted" against the possibility of using Afrikaans in official business. I am unable to follow this reasoning.

7 First, "targeted" connotes aiming at one particular object from among other objects: in this case singling out at "Afrikaans" from other non-official languages for the purpose of affording it discriminatory treatment. It may very well be said that in assimilating Afrikaans to a "tribal" language, the circular was perhaps unintentionally derogatory of Afrikaans. However, a reasonable construction of the circular would suggest that a difference was being made essentially between the official language and all unofficial languages.

8 Secondly, of course, the circular specifically mentions Afrikaans. The reason is stated in the first paragraph of the circular. The important point, however, is that neither the complaint of the authors nor the terms of the circular suggest that a more favourable treatment was being given to other unofficial languages. Indeed, the terms of the circular suggest quite the contrary. In my view, therefore, there is no basis for a finding of discriminatory treatment in violation of Article 26.

9 The real complaint of the authors with regard to Article 26, when seen in the context of their other complaints, would suggest that they still hanker after the privileged and exclusive status they previously enjoyed in matters of occupation of land, self-government and use of language under a system of fragmented self-governments which apartheid permitted. Such a system no longer avails under the unified nation which the Constitution of their country has created.

(Signed) R. Lallah

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion by Martin Scheinin (concurring)

I share the Committee's conclusions in relation to all aspects of the case. On one particular point, however, I find that the Committee's reasoning is not fully consistent with the general line of its argumentation. In paragraph 10.8, the Committee, in my opinion unnecessarily, emphasizes the individual nature of rights of participation under article 25. In my view there are situations where article 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and, in particular, indigenous peoples. When such a situation arises, it is not sufficient under article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation. As is emphasized at the end of paragraph 10.3 of the Views, the right of self-determination under article 1 affects the interpretation of article 25. This obiter statement represents, in my opinion, proper recognition of the interdependence between the various rights protected by the Covenant, including article 1 which according to the Committee's jurisprudence cannot, on its own, serve as the basis for individual communications under the Optional Protocol.

Irrespective of what has been said above, I concur with the Committee's finding that there was no violation of article 25. In my opinion, the authors have failed to substantiate how the 1996 law on regional government has adversely affected their exercise of article 25 rights, in particular the operation and powers of local or traditional authorities. On the basis of the material they presented to the Committee, no violation of article 25 can be established.

(Signed) M. Scheinin

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

N. Communication No. 767/1997, Ben Said v. Norway
(Views adopted on 29 March 2000, sixty-eighth session)*

Submitted by	Zouhair Ben Said
Alleged victim	The author
State party	Norway
Date of communication	28 October 1996 (initial submission)
Date of decision on admissibility	21 July 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2000,

Having concluded its consideration of communication No. 767/1997 submitted to the Human Rights Committee by Zouhair Ben Said under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following

Views under article 5, paragraph 4, of the Optional Protocol

1 The author of the communication is Mr. Zouhair Ben Said, a Tunisian citizen. He claims to be a victim of a violation of his rights by Norway.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipolito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of an individual opinion (dissenting) by members Bahgwati, Kretzmer, Medina and Lallah is appended to this document.

The facts as presented by the author

2.1 The author married a Norwegian citizen on 29 September 1976, in Tunisia. That same year the author obtained a residence permit and immigrated to Norway. In September 1977, a daughter was born, who received the Norwegian nationality in 1979. The author was granted a permanent residence permit. In 1982, a second child was born.

2.2 At the end of 1980 the author was sentenced to 5 years of imprisonment, because of a drug offence. In October 1982, the Norwegian authorities informed him that he would be expelled from Norway after serving half of his sentence. The author appealed against this decision to the Ministry of Justice. His appeal was rejected on 22 November 1982. The author then, using a leave from prison, escaped Norway to go to France with his wife and children. From there, the author and his family moved to Tunisia, where they lived from February 1983 onwards.

2.3 In 1987, the author and his wife contacted a Norwegian lawyer, because they wanted to move back to Norway. According to the author, he was then informed that the Ministry of Justice would consider granting him a residence permit once he and his family would be back in Norway and he would have served the remainder of his sentence.

2.4 In November 1987, the family returned to Norway. While the author was serving his sentence, his wife filed for separation and sole custody of the children. In an oral settlement of 18 April 1988, the author and his wife agreed to separation. On 10 October 1988, the Court gave sole custody of the children to the mother and the author was given regular access. The author's wife changed the family name of the children to her own and had Norwegian passports issued for them on her name, in accordance with Norwegian rules governing custody. According to the author, he has filed a cassation appeal against the October 1988 judgment.[1]

2.5 On 16 May 1988, the Ministry of Justice annulled the previous expulsion order. In May 1989, the author was released from prison.

2.6 On 9 October 1989, the author's wife filed for denying the author access to the children. In January 1990, the Court provisionally provided limited access in the presence of a third person, an arrangement which was apparently not kept. On 17 January 1990, the author was refused a residence permit. By judgment of 7 May 1990, the Court revoked the author's visiting rights, because of the alleged risk that he would kidnap his children. Subsequently, the author's appeal against the denial of his residence permit was refused on 28 May 1990. He was ordered deported by the Ministry of Justice and on 14 June 1990, he was arrested and shortly thereafter returned to Tunisia, against his will. The author appealed the Court's decision revoking his visiting rights to the Eidsivating High Court. On 21 December 1990, his appeal was rejected because he was unable to provide security for the costs, a condition when plaintiffs reside abroad.

2.7 On 19 November 1991, the author by writ of summons demanded to be awarded custody and access. This was denied by the Court on 21 January 1992, after a hearing in the author's presence.

2.8 Visa applications by the author in order to visit his children were denied by the Norwegian authorities on several occasions from 1992 to 1994. On 26 February 1992 and on 18 October 1994, the author tried to enter Norway without a visa and was rejected on entry. On 19 October 1994, the author was ordered expelled for repeated violations of the Immigration Act. On 8 September 1995, he requested asylum in Norway, which was denied.

2.9 On 15 January 1996, the author filed an action with the Oslo City Court for custody and access to his children. On 22 March 1996, he applied for a visa to attend the Court hearing of his case, which was scheduled for 24 July 1996, for which he had received a convocation. Because he did not receive an answer in time, the hearing was postponed until 14 January 1997. On 20 August 1996, the Ministry of Justice refused the author a visa to enter the country, because of indications that he would not voluntarily leave Norway after the hearing. Nevertheless, the author, who wanted to be present at the hearing, arrived at the airport of Oslo, where he was refused entry. He was not allowed to make any phone calls and in the morning of 14 January, he was handed a decision of deportation, put on a plane, and sent back to Tunisia. At the court hearing, he was represented by a lawyer. On 11 March 1997, the author's claim was heard and dismissed by the Court. On 22 October 1997, his appeal against the Court's decision was dismissed by the Borgarting High Court for failure to have it co-signed by a lawyer.

The complaint

3 The author claims that he is a victim of discrimination, and that other Europeans are not treated in the same way. He also claims that he is a victim of a violation of the right to fair trial.

The State party's admissibility submission and the author's comments

4 The State party submits that it is unclear what the author claims has been in breach of the Covenant. It understands that the complaint relates mainly to the denial of residence permit and visa in the author's case. In this connection, the State party points out that all administrative decisions concerning residence permits and visa can be brought before the courts for judicial review. The courts' review encompasses the question of whether the decision was in accordance with international law. According to the State party, the author's rights to petition for judicial review are not affected by the fact that he resides in Tunisia.

5.1 In his comments, the author submits that the decision to refuse him a residence permit was taken on the pretext that he had been refused access to his children. In this context, he refers to an exchange of correspondence between his ex-wife's lawyer and the Ministry of Justice. He contends that a permanent residence permit cannot be revoked simply upon request of his ex-wife. He claims that his de facto expulsion from Norway was abusive, and that an appeal was not effective, as shown by his deportation, while the administrative appeal was still pending.

5.2 He further suggests that the Norwegian authorities are using immigration procedures against him to prevent him access to court in his case of visiting rights and custody over his children.

5.3 He further denies that he ever entered Norway illegally, because he always presented himself to the airport police in order to obtain a legal entry permit, which was then refused, and that he never left the international zone of the airport.

5.4 The author further points out that the Ministry of Justice, which is the appeal instance for decisions taken by the Directorate of Immigration, always takes its decisions at the last minute or even too late.

5.5 The author claims that the Court's decision of 11 March 1997, refusing him access to his child, is unacceptable because he was prevented from personally attending the hearing scheduled for 14 January 1997, but kept against his will at the Oslo airport, despite a convocation from the court to attend the hearing.

5.6 The author further claims that it is illegal that the State party has issued passports for his children under their mother's name. He states that his children always had a Tunisian passport under his family name.

5.7 In respect of the State party's claim that he has failed to exhaust all domestic remedies, the author states that he has done what was in his power to do, and that ten years of interventions and appeals have remained without success. He states that he does not have the means to pay for any further court actions, and that he is not prepared to lose another ten years by trying in vain to obtain redress. He adds that good contact between him and his ex-wife and children has been re-established.

5.8 The author demands that the deportation order of 28 May 1990 be annulled, as well as all decisions based on this order, that the judgement denying him access to his children be rejected, that the expulsion order against him be lifted and that he be paid compensation for moral and material damages.

The Committee's admissibility decision

6.1 During its sixty-third session the Committee considered the admissibility of the present communication.

6.2 The Committee took note of the State party's argument that the communication was inadmissible for non-exhaustion of domestic remedies. The Committee noted that with respect to the denial of a residence permit to the author and with respect to the expulsion order of 1994, the author had made no efforts to appeal these matters to the courts, and concluded that this aspect of the communication was therefore inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

6.3 A separate issue arose, however, in relation to the author's claim that he was not allowed to attend in person the hearing before the Oslo City Court, scheduled for 14 January 1997. The Committee noted that the author appealed the Court's decision following the hearing, also on the ground that the hearing had been unfair because he was not present in person, and that the appeal was rejected because it was not co-signed by a lawyer. The Committee took note of the author's

arguments that he had no means left to go to court. In the circumstances, the Committee found that the author had made a reasonable effort to exhaust available domestic remedies and that the requirement of article 5, paragraph 2(b), did not prevent it from examining the author's claim.

6.4 The Committee considered that the author's claim that he was denied personal access to the Court in a hearing held on his initiative concerning the custody and visiting rights to his child, might raise issues under article 14, paragraph 1, and articles 17, 23 and 26, which should be considered on the merits.

7. Accordingly, on 21 July 1998, the Human Rights Committee decided that the communication was admissible.

State party's request for review of admissibility

8.1 By submission of 23 February 1999, the State party interprets the Committee's admissibility decision to mean that all complaints directed by the author against the Norwegian immigration authorities have been declared inadmissible, including the refusal of granting him an entry visa to enable him to attend the Court hearing.

8.2 On the other hand, if the Committee intended its decision as encompassing the refusal of the entry visa to the author to attend the court hearing, the State party challenges the admissibility of this issue, and requests the Committee to revise its decision. In this context, the State party explains that at the pre-admissibility stage, the preparation of its reply to the author's communication was hindered by the unfocused nature of the original communication.

8.3 The State party explains the contents of the immigration law applicable in the author's case. A foreign national, who does not hold a residence permit, must be in possession of a visa to enter Norway. Such a visa must be issued in advance and the application must be presented from abroad. If there is reason to fear that the foreigner will exceed his stay or try to take up residence in Norway, a visa may be refused. A foreign national who tries to enter Norway not carrying a visa or residence permit can be rejected on entry or during the following seven days. Expulsion of a foreigner is ordered when the foreigner has grossly or repeatedly contravened one or more of the provisions of the Immigration Act or evades execution of any decision that he leave Norway. An expelled foreigner is precluded from further entry. Only by special permission can he be granted leave to enter the country.

8.4 Applications for visa are dealt with by the first administrative instance of the Directorate of Immigration. Administrative appeals are dealt with by the Ministry of Justice. The administrative decisions are subject to the supervision of the courts.

8.5 The State party submits that when dealing with the custody and access case, the Oslo City Court had no competence to order the author's access to Norway. That question was a matter for the immigration authorities. The admissibility of the matter of the author's access to the Court hearing can therefore not be dealt with by asking whether the author appealed against the Oslo City Court judgement in the child case. For an alien to be able to appear in person before the national courts, it is necessary to obtain a permit issued by the immigration authorities. If denied entry, the recourse is to bring that administrative decision before the

Courts in the form of judicial review. In this context, the State party recalls that the author's expulsion from Norway had been ordered in 1994 for repeated violation of the Immigration Act and that this decision in principle prevents subsequent entry into Norway.

8.6 The State party refers to the developments in the author's case in 1996/1997 which show that he was aware of how the immigration system operates. As to the refusal of the visa, as a consequence of which the author was not able to attend the court hearing in the Oslo City Court, the State party recalls that the author applied for a visa on 22 March 1996, to attend the hearing scheduled for 24 July 1996. On 11 July 1996, the request was refused, because grounds existed to believe that the author would not leave Norway voluntarily after expiry of a visa. On 15 July 1996, the author appealed the refusal to the Ministry of Justice. The City Court was informed of the existence of the administrative appeal, and upon request from the author decided to postpone the hearing should the author not appear on 24 July 1996. On 20 August 1996, the Ministry upheld the refusal of a visa. The author was informed that he was entitled to legal representation for the court hearing. Upon receipt of the Ministry's decision, the author failed to apply for judicial review.

8.7 On 28 September 1996, an advocate presented himself as legal counsel for the author in the child case and applied for, and was granted, free legal aid, on the ground that the author could not personally be present in court. Subsequently, a new court hearing was set for 14 January 1997. Only on 4 January 1997, the author renewed his application for a visa through the Norwegian Embassy in Tunis. The Directorate forwarded the request to the Ministry, as it was perceived as an application for reevaluation of the Ministry's decision of 20 August 1996. The Ministry received the request on 13 January 1997. At that time, the author had already arrived at the Oslo airport and he was refused an emergency visa. The author then issued a written authority to his lawyer to represent him in the court hearing. From the record of the hearing of 14 January 1997, it appears that the lawyer represented the author without requesting any further postponement.

8.8 According to the State party, the author and his counsel were aware that the only possible action against the refusal of the visa was to bring an application for judicial review. Such an application is not subject to leave by the courts. According to the State party, the administrative discretion is limited by the domestic doctrine of abuse of power as well as by human rights provisions. If a decision is untenable according to national law or convention law, it will be annulled by the court. Had the author brought the refusal of his visa in August 1996 for judicial review, the court would have been able to adjudicate in time before the hearing in the child case.

8.9 The State party challenges the Committee's reasoning in finding that the author had made a reasonable effort to exhaust domestic remedies by appealing the Oslo City Court judgement without having the appeal co-signed by a lawyer. It submits that the requirement that an appeal be co-signed by a lawyer does not place an unreasonable burden on appellants. In this context, the State party points out that it is in the interests of justice that appeals are clear and concise and that they fulfill the relevant requirements. According to the State party, this requirement was in concreto not an unreasonable burden for the author, since the expense of a lawyer checking his appeal would have been quite limited, and his expense in this connection would have been covered by free legal aid. The author was notified by the Court of Appeal on 13 August 1997 of the requirement and was given until 15 September to rectify his appeal. His former lawyer also

received a copy. The author replied within the time limit, but did not comply with the requirement. The State party concludes that the author did not make a Areasonable effort" to have his appeal formally accepted.

8.10 In this context, the State party emphasizes the importance of the role of national courts in the protection of human rights, and argues that international supervision is secondary. In the present case, the national courts were not presented with the author's complaint that to deny him entry visa to attend the court hearing was contrary to international human rights law.

8.11 Accordingly, the State party requests the Committee to revise its decision on admissibility in accordance with rule 93(4) of the rules of procedure. The State party submits that the author's original communication to the Committee, presented a lot of different claims, and predated the court hearing of January 1997. The State party's arguments on the admissibility were therefore rather summary and did not address in detail the point later declared admissible by the Committee. In this context, the State party notes that the Committee never indicated before its decision on admissibility which of the various events and points mentioned by the author could be of particular interest.

The State party's submission on the merits

8.12 As to the question whether the January 1997 hearing before the Oslo City Court in the absence of the author was in violation of the Covenant, the State party submits that the author was represented by counsel since September 1996. The costs were covered by the State as free legal aid. The main hearing had already been rescheduled by the Court at an earlier occasion. In January, neither the author nor his counsel requested a further postponement of the hearing. In the circumstances, and considering that the child to which the author was seeking visiting rights was nearly 15 years old at the time, the State party submits that there was no reason for the Court to postpone the hearing proprio motu. The State party also points out that the author had given a written proxy to his counsel, which was submitted to the court. The State party recalls that it was not within the court's power to allow the author entry into Norway. For these reasons, the State party argues that the hearing before the court was fair and did not violate any of the articles of the Covenant.

8.13 In case the question whether the refusal of the visa constituted a violation of the Covenant has been declared admissible by the Committee, the State party notes that it is not clearly indicated in the Committee's decision in what way an issue arises under articles 14(1), 17, 23 and 26 of the Covenant. With regard to article 14(1), the State party reiterates that the hearing before the Oslo City Court was fair, and that it was outside the Court's competence to give the author access to Norway.

8.14 With regard to article 17(1), the State party recalls that the author had been divorced from his wife for a long time, and had practically no contact with his daughters for a number of years. If 17(1) were to come into play in the sense that through a court decision in his favour, the author could have re-established some contact with his daughter, the State party notes that the author was able to bring his case to court. The fact that he was not allowed entry into Norway in order to be present during the court case, can hardly be seen as a family matter, according to the State party.

8.15 With regard to article 23(4), the State party notes that the author's marriage was long since dissolved and not an issue during the court case. The State party cannot see how any issue arises under article 23(4) through the author's absence from the court hearing.

8.16 According to the State party it is likewise hard to see what issue might arise under article 26. It is unknown to the State party what the author compares with when alleging that he is a victim of discrimination, other foreigners in similar positions, other foreigners from different geographical areas or his ex-wife. As a consequence, the State party is unable to address the issue other than by simply refuting the allegation.

8.17 The State party goes on to address the competing interests in the case between the author and the immigration policy. As to the author's interest in being personally present at the court hearing, the State party begins by recalling the history of the author's case. It recalls that the author and his wife separated in 1988 and that the author was denied access to the children by judgement of the court of 7 May 1990, after a hearing on 25 April 1990 at which the author was present. The author was outside Norway since June 1990, and had practically no contact with his daughters since then. As to the question whether it was strictly necessary for the author to be present during the Court hearing of January 1997, the State party points out that the daughter to whom the author requested access was nearly 15 years old at the time of the hearing and that children become of age under Norwegian law when they are 18 years old. Further, to modify an earlier decision on access, special grounds must exist. Finally, according to Norwegian law, once the child has reached 12 years of age, considerable weight shall be given to the opinion of the child. In the present case, the child had informed the court that she objected to visits from her father. In the circumstances, the State party is of the opinion that it was not necessary for the author to be present in person at the court hearing. His direct testimony was not called for and he was represented by counsel paid through free legal aid.

8.18 As to the immigration policy interests, the State party points out that under international law States are free to prohibit or regulate immigration, and free to decide whether a foreigner should be allowed to continue his stay. By 1996/1997, the author had not had the right to stay in Norway for a number of years, and in fact was permanently excluded. He nevertheless continued to try to gain access to Norway in order to stay there permanently. In this context, the State party refers to the author's application of asylum in 1995. According to the State party, solid reasons therefore existed for fearing that the author would not leave Norway if allowed to enter on a time-limited visa.

8.19 With regard to the possible question why the author was not kept on in immigration custody, once he had been arrested on 12 January 1997, and allowed to attend the court hearing under police escort, the State party recalls that the author was well aware of the requirements for entry into Norway, and that he knew he would not be allowed in if he presented himself at the border without a visa. The State party argues that the granting of entry in a situation like the one created by the author in January 1997, would threaten the control system of visa applications which again would impair immigration control. The State party invokes a legitimate right in keeping immigration control systems and regulations intact. The State party concludes that the reasons for refusing the author entry were not arbitrary.

Author's comments on the State party's submission

9.1 In his comments, the author reiterates his previous allegations concerning events before 1996, denies that he has breached the Immigration Act, and claims that his expulsion in 1994 was unjust. He states that he has the right to show up at the airport of Oslo. He states that he has been continuously harassed by immigration officials ever since 1988. He challenges the judgement of 7 July 1990 of the Oslo City Court, and states that there was no reason to deny him visiting rights.

9.2 In respect to the denial of access in person to the Court hearing of January 1997, the author suggests that any further appeal concerning the refusal of his visa was no longer possible, because it was clear that the immigration authorities were biased against him. He explains that he arrived at the Oslo airport on Sunday evening 12 January 1997. He was kept at the airport all day Monday 13 January. According to the author, he was not allowed to call the judge at the Oslo City Court. His lawyer visited him in the course of the Monday evening, and the author signed a power of attorney on the understanding that the judge would be informed of what had happened, and that he would send a fax to the Immigration authorities. The author, however, was returned to Tunisia by plane the next morning at 7 a.m., before the judge could have been contacted. The author concludes that he indeed had made every reasonable effort to exhaust domestic remedies, and that the Committee's decision on admissibility is thus correct.

9.3 The author submits that it has never been his intention to stay in Norway clandestinely, and that the suspicions of the immigration authorities in this respect are ridiculous.

Issues and proceedings before the Committee

10 The Committee has noted and considered the State party's request for a review of the Committee's admissibility decision in the case. The Committee observes that certain parts in the reasoning presented for such a review are related to those claims that had already been declared inadmissible by the Committee and that the remaining arguments by the State party should be dealt with as part of the merits of the case. Consequently, the Committee decides to proceed to a consideration of the merits.

11.1 The Committee has considered the present communication in the light of all written information before it, in accordance with article 5, paragraph 1, of the Optional Protocol.

11.2 It has been confirmed by the author and the State party that the author appeared, on 12 January 1997 at the airport of Oslo, intending to participate in a court hearing at the Oslo City Court in a child custody and visiting rights case, scheduled for 14 January, to which he had received a convocation. It is likewise undisputed that the author was prevented by the administrative authorities of the State party from attending the hearing or from directly contacting the judge. He was, however, able to meet with his lawyer who participated in the hearing held on 14 January while the author had already been deported from Norway.

11.3 The right to a fair trial in a suit at law, guaranteed under article 14, paragraph 1, may require that an individual be able to participate in person in court proceedings. In such circumstances the State party is under an obligation to allow that individual to be present at the

hearing, even if the person is a non-resident alien. In assessing whether the requirements of article 14, paragraph 1, were met in the present case, the Committee notes that the author's lawyer did not request a postponement of the hearing for the purpose of enabling the author to participate in person, nor did instructions to that effect appear in the signed authorisation given to the lawyer by the author at the airport and subsequently presented by the lawyer to the judge at the hearing of the child custody case. In these circumstances, the Committee is of the view that it did not constitute a violation by the State party of article 14, paragraph 1, that the Oslo City Court did not on its own initiative, postpone the hearing in the case until the author could be present in person.

11.4 As the author's appeal in the Borgarting High Court was dismissed through the application of a uniform procedural rule after the author had been given an opportunity to remedy the deficieny in question, the Committee cannot find that the dismissal of the appeal constituted a violation of the author's rights under article 14, paragraph 1, of the Covenant.

11.5 As the Committee has found that the conduct of the court dealing with the author's case did not constitute a violation of article 14, paragraph 1, it concludes that no separate issue arises under articles 17, 23 or 26.

12 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] According to the State party, no appeal has been filed.

APPENDIX

Individual opinion by Committee members P. Bhagwati, D. Kretzmer, C. Medina and R. Lallah (dissenting)

We are unable to agree with the approach adopted by the Committee in declining to review its decision on the admissibility of the communication. We must recall that, under Rule 93(4) of the Committee's rules of procedure, the Committee may review a decision on the admissibility of a communication in the light of any explanations or statements provided by the State party. In this particular case, the State party has requested such a review on the ground that domestic remedies had not been exhausted by the author. For this purpose, the State party has made extensive submissions regarding the circumstances in which the Oslo City Court dealt with the author's custody case, as well as the issues related to the denial of the author's applications to be allowed entry into Norway. The author was given an opportunity to address these submissions.

The essence of the author's claim is that he was denied the opportunity to appear in person before the Oslo City Court in January 1997, when that court dealt with the author's child custody case. All the allegations regarding violations of specific articles of the Covenant are related to this claim. We note that the author was represented by a lawyer in the proceedings before the Oslo City Court. The lawyer did not ask the court to refrain from dealing with the case until the author was present, or to grant an adjournment so as to allow him to apply for judicial review of the administrative decision denying the author entry into Norway for purpose of attending the court proceedings. Furthermore, the author was duly informed about the technical deficiency of his appeal against the decision of the Oslo City Court and he was given an opportunity to repair the said deficiency. We also note that the author had a legal aid lawyer at the time, and he has not refuted the State party's assertion that he could easily have complied with the requirement that his appeal be cosigned by a lawyer.

In our opinion in these circumstances the Committee should revise its admissibility decision and hold the communication inadmissible for non-exhaustion of domestic remedies, under article 5(2)(b) of the Optional Protocol.

(Signed) P. Bhagwati

(Signed) D. Kretzmer

(Signed) R. Lallah

(Signed) C. Medina Quiroga

(Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

O. Communication No. 770/1997, Gridin v. Russian Federation
(Views adopted on 20 July 2000, sixty-ninth session)*

Submitted by	Mr. Dimitry L. Gridin (Represented by Mr. A. Manov of the Centre for Assistance to the International Protection)
Alleged victim	The author
State party	Russian Federation
Date of the communication	27 June 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 July 2000,

Having concluded its consideration of communication No. 770/1997 submitted to the Human Rights Committee by Mr. Dimitry L. Gridin, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following

Views under article 5, paragraph 4, of the Optional Protocol

1 The author of the communication is Mr. Dimitriy Leonodovich Gridin, a Russian student, born on 4 March 1968. He claims to be a victim of a violation by Russia of articles 14, paragraphs 1, 2, 3(b),(e) and (g). The case also appears to raise issues under articles 9 and 10 of the Covenant. He is represented by Mr. A. Manov of the Centre for Assistance to the International Protection.

The facts as submitted by the author

2 The author was arrested on 25 November 1989 on charges of attempted rape and murder of one Ms. Zykina. Once in detention, he was also charged with six other assaults. On 3 October 1990, the Chelyabinsk Regional Court found him guilty of the charges and sentenced

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. P.N. Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, and Mr. Abdallah Zakhia.

him to death. His appeal to the Supreme Court was rejected on 21 June 1991. Further appeals were rejected on 21 October 1991 and 1 July 1992. Appeals to the Prosecutor's Office were likewise rejected, respectively on 12 December 1991, 16 January and 11 March 1992. On 3 December 1993, the author's death sentence was commuted to life imprisonment.

The complaint

3.1 The author alleges that a warrant for his arrest was only issued on 29 November 1989, over three days after he was detained. He further states that he was denied access to a lawyer, despite his requests, until 6 December 1989.

3.2 He claims that he was interrogated during 48 hours, without being given any food and without being allowed to sleep. His glasses had also been taken away from him and he could not see much because of his shortsightedness. During the interrogation, he was beaten.[1] He states that he was told that his family was letting him down and that the only way to avoid the death penalty would be to confess. He then confessed to the six charges as well as to three other charges.

3.3 It is alleged that the author's lawyer was not informed by the investigator of scheduled court actions. In particular, in January 1990 the author was sent for a medical expertise and his lawyer was not informed.

3.4 The author claims that the handling of the evidence violated the Russian Code of Criminal Procedure. It is said that the author's clothes were transported to the laboratory in the same bag as the victims', and that therefore no value can be attached to the outcome of the examination that fibers of his clothes were found on the victims'. It is also claimed that there were irregularities in the identification process. The author alleges that he was led through the hall where the victims were sitting on the day of the identification. When one of the victims failed to point him out as the perpetrator, allegedly the investigator took her hand and pointed to the author. It is further submitted that the description by the victims of their attacker completely differs with the author's appearance.

3.5 The author claims that his right to presumption of innocence was violated. Between 26 and 30 November 1989 radio stations and newspapers announced that the author was the feared "lift-boy" murderer, who had raped several girls and murdered three of them. Also, on 9 December 1989, the head of the police announced that he was sure that the author was the murderer, and this was broadcasted on television. Furthermore, the author alleges that the investigator pronounced the author guilty in public meetings before the court hearing and called upon the public to send prosecutors. As a consequence, the author states that at his trial ten social prosecutors were present whereas he was defended by one social defender,[2] who was later forced to leave the court room.[3] According to the author, the court room was crowded with people who were screaming that the author should be sentenced to death. He also states that the social prosecutors and the victims were threatening the witnesses and the defense and that the judge did not do anything to stop this. Because of this, there was no proper opportunity to examine the main witnesses in court.

3.6 At the first day of the hearing, the author pleaded not guilty [4]. He was then placed in a lock-up. He complains that he was never allowed to discuss things with his lawyer in private.

3.7 He also complains that the witnesses who could have confirmed his alibi were not examined in court. Moreover, some statements given during the preliminary examination disappeared from the record.

3.8 It is further claimed that in violation of Russian law, the records of the trial were only compiled and signed on 25 February 1991, whereas the hearing finished on 3 October 1990. Three witnesses filed complaints to the Supreme Court, because of discrepancies between the record and what they had in fact testified.

3.9 The above is said to constitute violations of article 14, paragraphs 1, 2, 3(b),(e) and (g).

The State party's submission and the author's comments there on.

4.1 By submission dated 16 February 1998, the State party contends that the communication should be declared inadmissible since it was not submitted by the author himself, but by counsel on his behalf.

4.2 In a further submission, dated 26 February 1999, the State party addresses the merits of the communication. In this respect it submits that in order to respond to the Committee's request the Russian Federation Procurator's Office reviewed the author's case. It verified the statements of the victims and witnesses, the inspection of the place where the incidents took place, and the conditions under which the author was identified. In this respect, the State party contends that the argument that the author was innocent of the charges and that the investigation methods used violated his rights to a defence, as well as the issue of public pressure were all reviewed by the Supreme Court in its capacity as an Appeal Court, which considered them to be unfounded.

4.3 The State party contends that neither the author nor his lawyer ever raised the issue of police coercion before the courts. It further contends that the author was represented by a lawyer throughout the preliminary investigation, during which the author provided detailed information in respect of the crimes. According to the State party the author only retracted from these statements in court due to pressure placed on him by members of his family.

4.4 With respect to the allegation that the author was unable to read the statements since he was denied reading glasses, the State party notes that from the court records the author stated that he could read at a distance of 10 to 15 centimetres without glasses and furthermore, the investigators provided the author with glasses. Consequently, the State party rejects any violation of the Covenant in this respect.

4.5 Finally, the State party states that Mr. Gridin was questioned in the presence of the defence lawyer who was assigned to him in accordance with the law. The State party notes that Mr. Gridin was arrested on 25 November 1989 and on 1 December 1989 his mother V.V. Gridina, wrote requesting that the defence lawyer should be invited to participate in the investigations. On 5 December 1989 an agreement was concluded between Gridin's relatives and the lawyer who, from that time, was allowed to participate.

5 The author's counsel in a letter dated 14 September 1999, reiterates the claims of the original submission and points out that by the State party's own admission the author was unrepresented from 25 November to 1 December 1989.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The committee has ascertained as required under article 5, paragraph 2, (a) of the Optional Protocol that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee observes that the State party has objected to the admissibility of the communication, since the communication had been submitted by counsel and not by the author himself. The Committee, points out that according to its rules and practice the author may be represented by counsel and it is not therefore precluded form examining the merits of the communication. The Committee rejects the States party's contention that the communication should be declared inadmissible in this respect.

6.4 With respect to the allegations of ill-treatment and police coercion during the investigation period including denying the author the use of reading glasses, it appears from the material before it that most of these allegations were not raised before the trial court. All the arguments were raised on appeal but the Supreme Court found them to be unsubstantiated. In these circumstances, the Committee finds that the author has not substantiated a claim within the meaning of article 2 of the Optional Protocol.

6.5 With regard to the allegation that his lawyer was not informed of the dates of the court actions which dealt with medical issues the Committee notes that this matter was reviewed by the Supreme Court which found it to be in accordance with law and consequently considers that this claim remains unsubstantiated for purposes of admissibility.

7 The Committee declares the remaining claims admissible, and proceeds with the examination of the merits of all admissible claims, in the light of the information made available to it by the parties, as required by article 5 paragraph 1, of the Optional Protocol.

8.1 With respect to the allegation that the author was arrested without a warrant and that this was only issued more than three days after the arrest, in contravention of national legislation which stipulates that a warrant must be issued within 72 hours of arrest, the Committee notes that this matter has not been addressed by the State party. In this regard, the Committee considers that in the circumstances of the present case the author was deprived of his liberty in violation of a procedure as established by law and consequently it finds that the facts before it disclose a violation of article 9, paragraph 1.

8.2 With regard to the author's claim that he was denied a fair trial in violation of article 14, paragraph 1, in particular because of the failure by the trial court to control the hostile atmosphere and pressure created by the public in the court room, which made it impossible for defence counsel to properly cross-examine the witnesses and present his defence, the Committee notes that the Supreme Court referred to this issue, but failed to specifically address it when it heard the author's appeal. The Committee considers that the conduct of the trial, as described above, violated the author's right to a fair trial within the meaning of article 14, paragraph 1.

8.3 With regard to the allegation of a violation of the presumption of innocence, including public statements made by high ranking law enforcement officials portraying the author as guilty which were given wide media coverage, the Committee notes that the Supreme Court referred to the issue, but failed to specifically deal with it when it heard the author's appeal. The Committee refers to its General Comment No 13 on article 14, where it has stated that: "It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial". In the present case the Committee considers that the authorities failed to exercise the restraint that article 14, paragraph 2, requires of them and that the author's rights were thus violated.

8.4 With regard to the remaining allegations contained in paragraphs 3.4 and 3.7 supra, the Committee notes that the Supreme Court addressed the specific allegations by the author that the evidence was tampered with, that he was not properly identified by the witnesses and that there were discrepancies between the trial and its records. However, the rejection by the court of these specific allegations did not address the fairness of the trial as a whole and therefore does not affect the Committee's finding that article 14, paragraph 1, of the Covenant was violated.

8.5 With respect to the allegation that the author did not have a lawyer available to him for the first 5 days after he was arrested, the Committee notes that the State party has responded that the author was represented in accordance with the law. It has not, however, refuted the author's claim that he requested a lawyer soon after his detention and that his request was ignored. Neither has it refuted the author's claim that he was interrogated without the benefit of consulting a lawyer after he repeatedly requested such a consultation. The Committee finds that denying the author access to legal counsel after he had requested such access and interrogating him during that time constitutes a violation of the author's rights under article 14, paragraph 3 (b). Furthermore, the Committee considers that the fact that the author was unable to consult with his lawyer in private, allegation which has not been refuted by the State party, also constitutes a violation of article 14, paragraph 3 (b) of the Covenant.

9 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraphs 2 and 3(b), of the Covenant.

10 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Gridin with an effective remedy, entailing compensation and his immediate release. The State party is under an obligation to ensure that similar violations do not occur in the future.

11 Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] It is said that medical expert opinions of 18 January and 30 August confirm this.

[2] The author refers to social prosecutors and social defenders as provided for under the Russian system, who act in addition to the public prosecutor and defence counsel.

[3] From the file it appears that two social defenders were available to the author and that it was one of these who was forced to leave the court room.

[4] From the file it appears that the author pleaded not guilty of all charges except for the assault on Ms Zykina.

P. Communication No. 780/1997, Laptsevich v. Belarus
(Views adopted on 20 March 2000, sixty-eighth session)*

Submitted by	Vladimir Petrovich Laptsevich
Alleged victim	The author
State party	Belarus
Date of communication	18 August 1997 (initial submission)
Date of decision of admissibility	20 March 2000

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 March 2000,

Having concluded its consideration of communication No. 780/1997 submitted to the Human Rights Committee by Mr. Vladimir P. Laptsevich, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following

Views under article 5, paragraph 4, of the Optional Protocol

1 The author of the communication is Vladimir Petrovich Laptsevich, a Belorussian citizen, residing in Mogilev, Belarus. He claims to be a victim of a violation by the Republic of Belarus of article 19, paragraph 2, of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2 On 23 March 1997, in the centre of the city of Mogilev in Belarus, the author distributed leaflets devoted to the anniversary of the proclamation of independence of the People's Republic of Belarus. While distributing the leaflets, the author was approached by officers of the Mogilev

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Central District Internal Affairs Department who confiscated the 37 copies of the leaflet still in the author's possession and subsequently charged the author under article 172(3) of the Code of Administrative Offences for disseminating leaflets not bearing the required publication data. In accordance with the charge, the author was fined 390 000 roubles by the Administrative Commission. The author appealed the decision to the Central District Court, which on 13 June 1997 rejected his appeal. Further appeals to the Regional Court and the Supreme Court were dismissed respectively on 18 June 1997 and 22 July 1997. With this, it is submitted, all available domestic remedies have been exhausted.

Relevant domestic legislation

3.1 The author was sanctioned for not complying with the requirements set out in article 26 of the Act on the Press and Other Mass Media ("the Press Act"). This provision requires that

> "Every edition of a printed periodical publication shall contain the following details:
>
> 1) Name of publication, 2) Founder (co-founders), 3) Full name of the (editor-in-chief) or his deputy, 4) serial number of the edition and date of issue, and also, for newspapers, date when sent to press, price per issue (copy) or the indication "price not stipulated" or "free", 6) print run, 7) index number (for editions distributed by mail delivery services), 8) publisher's and printer's full addresses, 9) registration number."

3.2 Article 1 of the same Act sets out the scope of the requirements as it, inter alia, states that

> "Printed periodical publications" means newspapers, journals, brochures, almanacs, bulletins and other publications with unvarying titles and serial numbers, appearing not less than once per year.
>
> The regulations established by this Act for printed periodical publications shall apply to the periodical distribution in print runs of 300 copies and over of texts drafted with the help of computers and the information collected in their data bank and bases, and to other mass information media whose output is distributed in the form of printed communications, posters, handbills and other material."

3.3 Under article 172(3) of the Administrative Offences Code, it is an administrative offence to disseminate printed material which either is not produced in accordance with the established procedure, not indicates required publication data or contains matter detrimental to the State, public order or the rights and lawful interests of private individuals. Under the Code, such offences are sanctioned with fines and/or confiscation.

The complaint

4 The author claims to be a victim of a violation of his freedom of expression and opinion, as protected in article 19, paragraph 2. The author contends that the sanctions against him were unlawful as article 172(3) of the Administrative Offences Code is not applicable to his case. In

this regard, he submits that the leaflet contained information on the print run and the name of the organisation which issued the leaflet. He states that the print run of 200 was indicated on the leaflet precisely in order to make it clear that the Press Act did not apply to his publication. Moreover, it is submitted that the leaflets are neither periodicals nor publications intended for sale and that they could not be given any kind of serial number, index or registration number. Reference is also made to articles 33 and 34 of the Constitution of the Republic of Belarus which guarantee the right to freedom of expression and opinion and the right to disseminate information.

The State party's submission and the author's comments thereon

5.1 In its submission of 16 July 1998, the State party offers its comments on the merits of the communication. By way of introduction, the State party notes that it is not disputed by the author that on 23 March 1997 he distributed printed leaflets not containing all the publication data required under the Press Act. By doing so, he committed an offence under article 172(3) of the Administrative Offences Code. The State party points out that the exceptions from the publication data requirements for print runs less than 300 do not apply to leaflets.

5.2 The State party also submits that Athe leaflets distributed by the author include a misrepresentation of the historical formation of the State of Belarus, a description of alleged occupation by the Bolsheviks and of the armed struggle of the Belorussians against the Aoccupiers", together with a call to emulate "this struggle" for the independence of Belarus in the present day."

5.3 In conclusion, the State party asserts that the Belorussian legislation at issue and the enforcement of it is in full conformity with the State party's obligation under article 19 of the Covenant.

6.1 In his comments of 15 October 1998, the author contests that the leaflets "include a misrepresentation of the historical formation of the State of Belarus". He states that he has completed the highest historical education available in Belarus, and that all dates and facts mentioned in the leaflet were historically correct. The author accepts that he denoted the Bolsheviks "occupiers", but points out that the Republic of Belarus is a "non-ideologized" state and submits that any sanction based on this expression must run counter to article 19 of the Covenant.

6.2 The author disputes that the leaflet contained anything which can be interpreted as a call to emulate the struggle against the Bolsheviks to secure independence of Belarus in the present day. The author alleges that the sanctions against him were preconceived and amounted to persecution based on political motives as he is the chairman of the Mogilev branch of an opposition party, namely the Belorussian Social Democratic Party, Narodnaya Gramada.

Issues and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes that the author claims to have exhausted all domestic remedies and that the State party has not challenged this. The Committee is therefore not aware of any obstacle to the admissibility of the communication, and accordingly proceeds with the examination of the merits in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 The first issue before the Committee is whether or not the application of article 26 of the Press Act to the author's case, resulting in the confiscation of the leaflets and the subsequent fine, constituted a restriction within the meaning of article 19, paragraph 3, on the author's freedom of expression. The Committee notes that under the Act, publishers of periodicals as defined in article 1 are required to include certain publication data, including index and registration numbers which, according to the author, can only be obtained from the administrative authorities. In the view of the Committee, by imposing these requirements on a leaflet with a print run as low as 200, the State party has established such obstacles as to restrict the author's freedom to impart information, protected by article 19, paragraph 2.

8.2 The Committee observes that article 19 allows restrictions only as provided by law and necessary (a) for respect of the rights and reputation of others, and (b) for the protection of national security or public order (ordre public), or of public health or morals. The right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification.[1]

8.3 The Committee notes that the author has argued that article 172(3) of the Administrative Offences Code does not apply to him and that the sanctions thus were unlawful and constituted a violation of article 19 of the Covenant. The Committee is, however, not in a position to reevaluate the findings of the Belorussian courts with regard to the applicability of the said provision, which appears to leave room for interpretation (see paragraph 3.2 supra). Nonetheless, even if the sanctions imposed on the author were permitted under domestic law, the State party must show that they were necessary for one of the legitimate aims set out in article 19, paragraph 3.

8.4 In the very brief submission of the State party set out in paragraph 5.2 supra, it is implied that the sanctions were necessary to protect national security, as reference is made to the contents of the author's writings. There is, however, nothing in the material before the Committee which suggests that either the reactions of the police or the findings of the courts were based on anything other than the absence of necessary publication data. Therefore, the only issue before the Committee is whether or not the sanctions imposed on the author for not including the details required by the Press Act can be deemed necessary for the protection of public order (ordre public) or for respect of the rights or reputations of others.

8.5 In this regard, the Committee notes that the State party has argued that the requirements set out in article 26 of the Press Act are generally in full compliance with the Covenant. It has not, however, made any attempt to address the author's specific case and explain the reasons for the requirement that, prior to publishing and disseminating a leaflet with a print run of 200, he was to register his publication with the administrative authorities to obtain index and registration numbers. Furthermore, the State party has failed to explain why this requirement was necessary for one of the legitimate purposes set out in article 19, paragraph 3, and why the breach of the

requirements necessitated not only pecuniary sanctions, but also the confiscation of the leaflets still in the author's possession. In the absence of any explanation justifying the registration requirements and the measures taken, it is the view of the Committee that these cannot be deemed necessary for the protection of public order (ordre public) or for respect of the rights or reputations of others. The Committee therefore finds that article 19, paragraph 2, has been violated in the present case.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the International Covenant on Civil and Political Rights.

10. Under article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Laptsevich with an effective remedy, including compensation amounting to a sum not less than the present value of the fine and any legal costs paid by the author. The State party is also under an obligation to take measures to prevent similar violations in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] See, inter alia, Communication No. 574/1994, Kim vs. the Republic of Korea, Views dated 3 November 1998 and Communication No. 628/1995, Park v. the Republic of Korea, Views dated 20 October 1998.

Q. Communication No. 789/1997, Bryhn v. Norway
(Views adopted on 29 October 1999, sixty-seventh session)*

Submitted by	Monica Bryhn (represented by Mr. John Ch. Elden)
Alleged victim	The author
State party	Norway
Date of communication	5 November 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 October 1999,

Having concluded its consideration of communication No. 789/1997 submitted to the Human Rights Committee on behalf of Monica Bryhn, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, her counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1 The author of the communication is Ms. Monica Bryhn, a Norwegian citizen born on 21 October 1966. She claims to be a victim of a violation by Norway of article 14 (5) of the Covenant. She is represented by counsel, Mr. John Christian Elden.

The facts

2.1 On 3 February 1993, the author was convicted for import and sale of drugs on a commercial basis; she was sentenced to four years' imprisonment. On 16 June 1995, she was released on probation, the remaining 1 year and 132 days of her sentence being suspended.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.2 On 13 December 1995, while still on probation, the author was again arrested and charged with possession of heroin and other narcotics, the amounts being consistent with personal use. On 21 December 1995, she pleaded guilty to these offences at the Drammen Magistrate's Court and was accordingly convicted. The Court, exercising discretionary powers, then passed a joint sentence combining the remaining time of the previous sentence and the imprisonment for the new offence, thus sentencing her to a term of imprisonment of one year and six months. As required by law, the Court set out in its judgement the aggravating and mitigating circumstances and recommended transfer from prison to a centre for treatment of her addiction.

2.3 The author appealed the sentence to the Borgarting Court of Appeal. With respect to cases concerning a maximum sentence of less than 6 years, the Criminal Procedure Act provides that the Court of Appeal may disallow the appeal if the court unanimously considers it obvious that the appeal will not succeed. On 26 January 1996, the three-judge Court unanimously decided that the appeal had no possibility of leading to a lesser sentence and summarily dismissed the appeal without a full hearing. The author requested the Court to reconsider its decision, invoking article 14 (5) of the Covenant. On 26 March 1996, a differently constituted Court of Appeal decided by majority not to change the previous decision; part of the appellant's case concerned an alleged inconsistency between the Norwegian Criminal Procedure Act and article 14 (5) of the Covenant. This second decision was in turn appealed to the Appeals Committee of the Supreme Court, which on 6 May 1996 held that none of the three points of law put forward on the author's behalf (including a breach of article 14 (5) of the Covenant) was sustainable.

2.4 With this, all domestic remedies are said to be exhausted.

The complaint

3. In his communication, the author's counsel simply recites the above sequence of events and claims that it constitutes a breach of article 14 (5). However, he also sends copies of his presentations to the Court of Appeal and to the Supreme Court. In the Court of Appeal, he argued that, in order to comply with article 14 (5), domestic law must provide for a retrial both to establish the guilt of the accused as well as to determine the harshness of the sentence. He referred to the travaux préparatoires on the Criminal Procedure Act and suggested that a system requiring leave to appeal constituted a breach of article 14 (5). In the Supreme Court he argued that an appeal as to the severity of the sentence should be admitted regardless of the maximum penalty when the actual sentence is as high as one year and six months.

State party's observations and counsel's comments

4.1 In its comments, the State party does not raise any objections to the admissibility of the communication and addresses the merits of the communication. It explains that its appeal system was changed in 1995, and that the present system provides for a wider range of appeal possibilities than the old one. Under the old system, cases concerning charges punishable by imprisonment of more than six years, were tried by the Court of Appeal as a first instance court, and no appeal was possible in respect of the assessment of evidence in relation to the question of

guilt. Under the new system, all cases are tried by first instance courts, and all convicted persons have a right to appeal to the Court of Appeal. Following the new Criminal Procedure Act, Norway partially withdrew its reservation to article 14, paragraph 5, of the Covenant.[1]

4.2 The State party explains that the grounds on which an appeal may be lodged are unlimited and can concern any defect in the judgement or procedure. For reasons of procedural economy, a screening system was introduced, in order to avoid overburdening of the Court of Appeal. According to section 321 second paragraph, of the Criminal Procedure Act, the Court of Appeal (composed of three judges) may refuse to allow an appeal to proceed if the court unanimously considers it obvious that the appeal will not succeed. Thus, the Court of Appeal must in fact review the case in order to assess whether the appeal should be allowed to proceed. Appeals concerning crimes punishable by law with imprisonment of more than six years are always allowed to proceed. As a rule, appeals concerning an issue of evidence should also be admitted to a full hearing. According to section 324 the Court of Appeal takes its decision without oral hearings. The parties, however, are allowed to express their views in writing. Thus, the documents of the case, including the judgement of the Court of first instance, together with the arguments made in the submissions from the parties, constitute the basis of the assessment by the Court of Appeal.

4.3 In the instant case, the sole ground of appeal advanced by the author was the harshness of the sentence. She did not raise any questions relating to the assessment of evidence. Her main argument was that the Court should not have passed a joint sentence with the previous judgement. The review, therefore was mainly a question of the application of the penal Code and the case law of the Supreme Court. The relevant information could be found in the documents produced in relation to the hearing of the case in the Court of first instance.

4.4 The State party considers that the review so performed by the Court of Appeal does constitute a review within the meaning of article 14, paragraph 5. When amending the previous legislation and setting up the new system, the drafting committee and independent experts looked into the question of compatibility with article 14 (5) and concluded that the system was in compliance with the Covenant. The State party points out that the words "according to law" in paragraph 5 of article 14 govern the modalities by which the review by a higher tribunal is to be carried out, as stated by the Committee in its Views in case No. 64/1997 (Salgar de Montejo v. Colombia).[2] Article 14 (5) therefore covers a wide range of second instance supervision, having in common the essential requirement that the case be reviewed. In this regard, the State party argues that States must enjoy a certain margin with regard to the implementation of the right to review. Many States have enacted in one form or another a system of leave to appeal. According to the State party, even if second instance proceedings are limited to so-called "leave to appeal proceedings", they must be considered review within the meaning of article 14 (5).

4.5 The State party adds that an unlimited right to appeal could easily be subject to abuse and result in the courts being burdened with unreasonable cases. An unlimited right to appeal would unnecessarily lead to a heavier workload of the courts and might result in delays in breach of article 14 (3) (c). The State party emphasizes that the Court of Appeal also at the preliminary stage conducts an assessment of the merits of the appeal.

4.6 The State party is further of the opinion that when deciding whether a system is in compliance with article 14 (5), account must be taken of the entirety of the proceedings in the national legal system and the role and function of the appellate court therein. Provided that there has been an oral and public hearing at first instance, the absence of public and oral hearings during the appeal proceedings should be held to be justifiable, provided that the parties are given an opportunity to express their views in written form. In this context, the State party observes that the principle of "equality of arms" is observed.

4.7 The State party also refers to a decision by the European Commission of Human Rights of 26 October 1995, relating to the previous appeal system but raising similar issues as in the present case. The Commission considered that limitations in the form of regulation by the State should pursue a legitimate aim and not impair disproportionately the essence of the right to review. The Commission rejected as manifestly ill-founded the allegation that Norway's system infringed the right to review.

5. In her comments on the State party's submission, the author contests the State party's affirmation that the summary review by the Court of Appeal in her case constituted a review within the meaning of article 14 (5). According to the author, the denial of a full rehearing indicates that the court did not consider the merits of her case. She has therefore not enjoyed a genuine review of her case by a higher tribunal, as prescribed by article 14 (5).[3]

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has not challenged the admissibility of the communication. The Committee is not aware of any obstacle to the admissibility of the communication. Accordingly, it finds the communication admissible and proceeds without delay to a consideration of its merits.

7.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes that the author of the present case appealed the judgement of first instance only in respect of the sentence imposed. The Court of Appeal, sitting with three judges, in accordance with section 321 of the Criminal Procedure Act, reviewed the material that had been before the court of first instance, the judgement and the arguments advanced on behalf of the author as to the inappropriateness of the sentence, and concluded that the appeal had no possibility of leading to a reduced sentence. Moreover, the Court of Appeal again reviewed the elements of the case when reconsidering its earlier decision, and this second decision was subject to appeal to the Appeals Committee of the Supreme Court. Although the Committee is not bound by the consideration of the Norwegian parliament, and sustained by the Supreme Court, that the Norwegian Criminal Procedure Act is consistent with article 14 (5) of the Covenant, the

Committee considers that in the circumstances of the instant case, notwithstanding the absence of an oral hearing, the totality of the reviews by the Court of Appeal satisfied the requirements of article 14, paragraph 5.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] On 19 September 1995 Norway declared that following "the entry into force of an amendment to the Criminal Procedure Act, which introduces the right to have a conviction reviewed by a higher court in all cases, the reservation made by the Kingdom of Norway shall continue to apply only in the following exceptional circumstances:

1. Riksrett (Court of Impeachment)

According to article 86 of the Norwegian Constitution, a special court shall be convened in criminal cases against members of the Government, the Storting (Parliament) or the Supreme Court, with no right of appeal.

2. Conviction by an appellate court

In cases where the defendant has been acquitted in first instance, but convicted by an appellate court, the conviction may not be appealed on grounds of error in the assessment of evidence in relation to the issue of guilt. If the appellate court convicting the defendant is the Supreme Court, the conviction may not be appealed whatsoever."

[2] Views adopted by the Committee on 24 March 1982.

[3] Counsel refers to Nowak, CCPR commentary, 1993, page 266, concerning article 14 (5): "Remedies of cassation are thus just as admissible as meritorial appeals, as long as the appeal deals with a genuine review ("examine"). It is thus doubtful whether proceedings limited to mere questions of law are sufficient. [...] In appellate proceedings as well, the guarantees of a fair and public trial are to be observed."

Annex X

DECISIONS OF THE HUMAN RIGHTS COMMITTEE DECLARING COMMUNICATIONS INADMISSIBLE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 748/1997, Gómez Silva v. Sweden (Decision adopted on 18 October 1999, sixty-seventh session)*

Submitted by	Nelly Gómez Silva and family
Alleged victim	The author
State party	Sweden
Date of communication	4 June 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 October 1999,

Adopts the following

Decision on admissibility

1. The author of the communication is Mr. Luis Fabio Barrero Lozano on behalf of his wife Mrs. Nelly Gómez Silva, and their children Carlos Eduardo, Marisol, Fabiola, Adriana and Francisco Habib, all Colombian citizens, residing in Colombia at the time of submission of the communication. He claims that his wife has been a victim of violations by Sweden of articles 9, paragraphs 1,2,3,4, and 5, 10, paragraph 1, 14, paragraph 2, 3 (a), (c) and (d) of the International Covenant on Civil and Political Rights.

Facts as submitted by the author

2.1 On 17 May 1991, Mr Barrero travelled to Sweden with two of his children, Adriana and Francisco Habib, then 13 and 12 years old respectively. He requested asylum there. Allegedly their lives had been threatened for political reasons. On 30 December 1991, Mrs Gómez arrived

* The following members of the Committee participated in the examination the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

in Sweden with her daughter Fabiola, then 15 years old. She applied for a residence permit. Sixteen months later the remaining two children Carlos Eduardo and Marisol, then 21 and 20 years old respectively, travelled to Sweden seeking family reunification.

2.2 On 24 June 1993, Mrs. Gómez and her family were refused residence permits and were asked to leave. On 2 July 1993 they were detained by the police. At 8.30 a.m., on that day, five policemen, an interpreter, the person in charge of the refugee centre and the social worker in charge of the Barrero family, informed them of the decision to deport them. Mr. Barrero and his son Carlos Eduardo were placed in different jails, while Mrs. Gómez and the rest of the family were put in a hotel room under police custody.

2.3 On 7 July 1993, Mr. Barrero, his son Carlos Eduardo and one of his daughters were sent back to Colombia. In the meantime, the other three children (Francisco Habib, Adriana and Fabiola) who were with Mrs. Gómez, escaped from police custody. It would appear that Mrs. Gómez was kept in police custody until the children were found. However, on 28 July, Mrs. Gómez was deported back to Colombia. Her three children were sent back to Colombia in September and October.

The complaint

3.1 The author alleges a violation of article 9, paragraphs 1 to 3, in that his wife was arbitrarily detained for 21 days, after the Swedish authorities had informed them of the rejection of their request for asylum in Sweden. In this respect, he claims that no charges were brought against his wife during her 21 day detention.

3.2 Mrs. Gómez appealed the rejection of her asylum request to the Enköping Tribunal. On 22 July 1993, she received a summons to appear before the Appeal Tribunal of Enköping. It is alleged that the police never allowed her to appear before that Tribunal and that there are no copies of the summons. In this respect, Mr. Barrero claims a violation of article 9, paragraph 4.

3.3 The author also claims that his wife is entitled to compensation, in accordance with article 9, paragraph 5, of the Covenant, for the violations suffered.

3.4 Mr. Barrero alleges a violation of article 10, paragraph 1, for the degrading treatment his wife received, during the 21 days she was detained. He further alleges that as a result of the conditions of detention, his wife now suffers from a bronchial disease, entailing great medical expenses.

3.5 Furthermore, the author alleges a violation of article 14, paragraph 2 of the Covenant, in respect of his wife, for the oral accusations made against her by the Borlänge police; she was accused of being the instigator of the children's escape.

3.6 Mr. Barrero claims a violation of article 14, paragraph 3 (a), (c) and (d) for the lack of procedural guarantees during the expulsion process. In this respect, he alleges that the legal aid lawyer only went to see Mrs. Gómez the day before she was deported.

3.7 On 12 August 1993, Mrs. Gómez submitted a complaint to the Human Rights Office in Santiago de Cali (Personeria Municipal de Santiago de Cali/Delegada para la Defensa de los Derechos Humanos). The Human Rights Officer (Personero Delegado I para la Defensa de los Derechos Humanos) Mr. Hernan Sandoval Quintero, recommended that she take her case to the Swedish courts, and then to the Human Rights Committee. The author submitted the case to the Swedish Ombudsman, who on 6 December 1995, informed him that he was not competent to deal with the compensation claim for the arbitrary detention suffered by his wife. On 5 January 1996, the Chancellor of Justice (Highest Authority advising the Ombudsman on legal matters), informed Mrs. Gómez that there were no grounds for compensation, as her detention had been in conformity with law. With this, it is alleged that all domestic remedies have been exhausted.

The State party's information and observations on admissibility and author's comments thereon

4.1 In a submission dated 7 May 1997, the State party contends that the communication should be declared inadmissible for non-exhaustion of domestic remedies, since the author has not brought the claim for damages before any court in Sweden.

4.2 With respect to the facts of the case the State party claims that these were that the Barrero Gómez family arrived in Sweden legally and requested asylum which was denied them. When deportation was to take place Mrs Gómez Silva tried to commit suicide and the 3 youngest children absconded. Mr. Barrero and his two eldest children were returned to Colombia on 7 July 1993. Mrs Gómez Silva was sent back to Colombia on 29 July 1993 after an additional request for asylum had been rejected by the board. Two of the absconded children were sent back in September of 1993 and the last child was returned on 6 October 1993. On 8 July 1993 Mrs Gómez Silva lodged an appeal to the Administrative Court of Appeal of Jonkoping against the detention order of 7 July. This was dismissed on 14 July. The Court stated inter alia that Mr. Gómez Silva's activities were of such a character that the conditions for issuing a detention order were met. It emphasized that the family had not been separated due to the detention order but rather due to the children's behaviour. On 30 July the Administrative Court decided not to examine a fresh appeal lodged by Mrs Gómez Silva since the question of the detention had already been settled by the Court in its previous ruling.[1]

4.3 With respect to the procedures to be followed by asylum seekers the State party informs the Committee that the Government has no jurisdiction of its own in alien cases, since these are referred to one of two Independent Boards. Mrs Gómez Silva appealed to the Administrative Court of Appeal against the detention order of 7 July 1993, but lodged no further appeal to the Supreme Administrative Court. However, the State party also states that "it is of course not likely that she would been granted leave to appeal, which is a precondition for the Supreme Administrative Court to examine a case".

4.4 With regard to paragraph 4, of article 9, the State party contends that Mrs Gómez Silva did in fact avail herself of this right since she challenged the lawfulness of her detention before the Court. In this respect, the State party further points out that had the detention indeed been unlawful Mrs Gómez Silva would have been entitled to a remedy under the 1974 Act on Damages for the Restrictions of Liberty.

4.5 Mrs Gómez Silva complained to the Parliamentary Ombudsman and tried to claim damages, the Parliamentary Ombudsman decided not to examine the matter since the case was also before the Chancellor of Justice and it was being investigated. The State party contends that the complaint before the Chancellor of Justice was for a mere allegation of a violation of human rights with no reference to any particular right, she just requested an investigation and claimed damages for her unlawful arrest. The Chancellor of Justice decided, on 5 January 1996, not to grant compensation, since in his view the deprivation of liberty had not been manifestly ill-founded and the State was not liable under the 1974 Act on Damages for Restrictions on Liberty. Nor were there any other grounds for granting compensation. The State party accordingly considers that the case should be declared inadmissible for non exhaustion of domestic remedies, since the claim for damages was not brought before any Swedish court.

4.6 The State party further goes on to explain the provisions of the Aliens Act and the conditions under which aliens may be placed in detention or under special supervision, as well as the specific conditions applicable to aliens under the age of 16, in that these may not be detained but only placed under supervision. In particular, it refers to the provision under which aliens may not be detained for a period longer than two months unless there are strong reasons for an extension. These orders will be reconsidered in a period of no more than two months following the day on which the detention order was put into effect and within six months after it was issued.

4.7 With respect to the allegations under article 9, paragraph 1, of the Covenant the State party considers that the detention orders were issued according to law and consequently were not arbitrary in any way. It also contends that paragraph 2, of article 9, is not applicable to the present case since Mrs Gómez Silva was not charged for a criminal offence.[2] It does, however, point out that from the decision of the Chancellor of Justice it appears that Mrs Gómez Silva was duly informed in her own language of the reasons for her arrest. The State party further considers that the communication does not raise any issues relating to article 9, paragraph 5.

4.8 With regard to the particulars of Mrs Gómez Silva's treatment while in detention, the State party considers that: "the Government is in no position to make any comments since these circumstances are not known to the Government." It considers that there is no claim since the Chancellor of Justice saw no reason to take any action against the enforcement authorities or against any public officials as a consequence of Mr. Barrero's allegations. Furthermore, since 4 years have elapsed since the events occurred, it is not in a position to look into the case. The State party considers these claims as mere blanket allegations with no substantiation.

4.9 Finally, regarding the allegations under article 14 of the Covenant the State party considers that Mrs Gómez Silva has not availed herself of the mechanisms available to guarantee these rights. With regard to the claims under article 14, paragraphs 2 and 3, it considers that these guaranties only apply to persons charged with a criminal offence which is not the situation in the present case.

5.1 The author of the communication challenges certain facts provided by the State party. He points out that his wife did not try to commit suicide because of the deportation order but rather because of the atmosphere that was created in the apartment when the police authorities, the

interpreter, etc came to order them to the police station. He himself was not allowed to finish his toilette since he was dragged out of the bathroom when the police arrived. The author further contests the State party's allegation that Mrs. Gomez Silva had constant telephone contact with her absconded children, and states that she only had contact with her nephews who live legally in Sweden. He claims that this can be attested to by the interpreter, who was present with the doctor who attended to Mrs. Gómez Silva.

5.2 With respect to the events related to the detention he states that he and all his family were detained at the same time and taken in various cars to the Borlänge police station. On arrival at the police station his son Carlos Eduardo Barrero was searched and put into a cell. Mr. Barrero was the second to arrive together with his daughter Adriana Barrero Gómez, in a car that went into an underground car park. Behind them was a further car with his wife Nelly Gómez and the three younger children Marisol, David and Fabiola, who also entered through the underground access. In the basement they were taken towards an elevator and Mr. Barrero claims to have strongly resisted being taken into the elevator. The police consequently, dragged him into it, ill-treating him in front of his family. This is what caused the hysteria of his daughters. He was taken to the retaining cells where he was searched and placed in a cell. The rest of his family were put back into a van and taken from the basement to the front of the police station where they were placed in one of the police station's offices, where they spent approximately 5 hours. Later they were taken to a hotel which is just opposite the police station where they were guarded by four policemen who didn't let them out of their sight even to go to the toilet. He reiterates that his wife and children remained there for 4 days guarded night and day. On the fifth day the three youngest children were taken back to the police station accompanied by two policemen. On the way from the hotel to the police station the three children managed to abscond. The police searched for them. After the three youngest children absconded Mr. Barrero Lozano and his two eldest children were sent back to Colombia on 7 July 1993. Mrs. Nelly Gómez was taken to a lock up cell where she was kept for 21 days before she was sent back to Colombia.

5.3 The author stresses that he is not questioning the Swedish authorities' decision not to grant him asylum, nor the family's deportation but rather the way in which the deportation order was executed by the Borlänge Chief of Police, in particular the fact that his wife was kept in a lock up cell for 21 days allegedly awaiting the return of the absconded children and yet she was deported 21 days later with the children still missing.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee considers that the information before it and the arguments advanced by the author do not substantiate, for purposes of admissibility, the author's claim that his wife's rights under articles 9, paragraphs 2, 3, 4 and 5, 10, paragraph 1, and article 14 were violated.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 2 of the Optional Protocol;

(b) that this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] On 30 July 1993 Mrs. Gómez Silva, by the State party's own admission had already been deported.

[2] Reference is made to page 168 of M. Nowak's Commentary on the Covenant.

B. Communication No. 756/1997, Doukouré v. France
(Decision adopted on 29 March 2000, sixty-eighth session)*

Submitted by:	Mrs. Mathia Doukouré (represented by Mr. Jean-Francois Gondard, lawyer in Paris)
Alleged victims:	The author and 48 others
State party:	France
Date of communication:	17 May 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2000,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Mrs. Mathia Doukouré and 48 other widows of/or retired members themselves of the French Army, nationals from Senegal and the Ivory-Coast. They claim to be victims of a violation of article 26 of the International Covenant on Civil and Political Rights by France, due to an alleged discrimination on grounds of nationality and national origin in the determination of their right to receive a pension or survivors' pension. They are represented by Jean-François Gondard, legal counsel.

The facts as submitted

2.1 It is stated that following the independence of former French colonial territories, and the change of nationality of their inhabitants, a law was adopted on 26 December 1959, stipulating in its article 71-I that from 1st January 1961, pensions paid to retired members of the French Army native of these territories were to be converted into personal life annuities. In the case of

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Under rule 85 Ms. Chanet did not participate in the examination of the present communication.

Senegal, the acquired rights of retired soldiers were nevertheless respected after independence in 1960, until the Finance Act of December 1974 and subsequent legislation, which extended the implementation of the law of 31 December 1959 to Senegal as of 1 January 1975.

2.2 The consequences of the legal provisions were that the level of these annuities was "frozen" for the future, and that they could not be converted into reversion pensions to widows of the beneficiaries. On the other hand, pensions of retired soldiers native of France were not converted into personal life indemnities and therefore continue to be subject to revaluation and to be convertible into reversion pensions.

2.3 The authors argue that pensions to former members of the French Army are essentially granted as an acknowledgment of the services rendered by them to the French nation, and that therefore national origin or a change in nationality are completely irrelevant in this matter.

2.4 Concerning more particularly the situation of Mrs. Doukouré from Senegal, it is stated that her husband, as native of a French colony, was of French nationality and a member of the French Army until his death on 12 October 1950, that is before the independence of Senegal. The annuity she receives since that time has been nevertheless frozen at the level it had on 1st January 1975, unlike pensions paid to French widows of soldiers native of metropolitan France.

2.5 Her claims for an augmentation of her pension have been dismissed by the French Defense Ministry on 12 February 1992 and 22 June 1994, on the grounds that pensions paid to Senegalese nationals had been frozen by the law of 31 December 1959. She appealed against the last decision of the Defense Ministry before the Poitier administrative court. Before deciding on the merits of the case, the court asked the French Conseil d'Etat to advice it on the question of compatibility between article 71-I of the law of 26 December 1959 and article 26 of the International Covenant on Civil and Political Rights.

2.6 The Conseil d'Etat adopted its views on 15 April 1996, stating that article 26 of the International Covenant on Civil and Political Rights only refers to rights set forth in that Covenant and thus does not guarantee the principle of non discrimination in pension issues. It further stated that individuals designated in article 71-I of the law of 26 December 1959 cannot therefore invoke article 26 of the Covenant.

2.7 Following the views of the Conseil d'Etat, the Poitier administrative court dismissed Mrs. Doukouré's complaint on 3 July 1996. On the same day, it also dismissed the complaint by Ms. Donzo Bangaly. Ms. Yero Diallo's claim had already been dismissed by the Poitier administrative court on 19 June 1996. On 17 July 1996, the Paris administrative court rejected the claim submitted by 43 other authors.

The complaint

3.1 The applicants refer to the Views of the Human Rights Committee adopted on 3 April 1989 regarding communication No. 196/1985 submitted by Mr. Ibrahima Gueye and others on a comparable pension issue. They allege that the decision of the Conseil d'Etat is in full contradiction with the views adopted by the Committee in this case and with the constant

jurisprudence of the Committee in considering the right protected in article 26 of the Covenant as an independent one, not only related to the other civil and political rights protected in the Covenant. They complain that French authorities did not take any relevant action concerning the views adopted by the Committee, and that they are thus violating article 2, paragraph 3, of the Covenant.

3.2 The authors further allege that discriminations in their cases are not merely based on nationality, but on national origin. The authors state that France arbitrarily deprived its nationals native of overseas territories of their French nationality, in order not to have to pay them any military pension. They further state that people from African French territories have been struck off the French Army's registry, and integrated into armies of new African States without their consent, thus involuntary losing French nationality. They allege that the change of status of former overseas territories, decided by Act of 4 June 1960, violated the right of self-determination of peoples as protected by article 1 of the Covenant. They further allege that the purpose of current French law on nationality, and the determination of French nationality by the authorities, is still to avoid granting military pension to former members of the French Army native of overseas territories. They complain that this has led to serious humanitarian problems.

3.3 As to the admissibility of the case, it is stated that although the alleged discriminations have begun before 17 May 1984, date of entry into force of the Optional Protocol for France, they also remain after that date, thus constituting a continuous violation of the authors' rights. Reference is also made to article 5, paragraph 2 (b) of the Optional Protocol. The applicants state that twenty years of procedures and negotiations with the French Government concerning the issue at stake did not have any success, and that the exhaustion of all available remedies will cause considerable delays, and will not lead to a satisfactory solution to the problem. It is further asserted that following the opinion of the French Conseil d'Etat on 15 April 1996, any subsequent appeal before French courts would be bound to fail. Moreover, on 21 May 1996, the authors' request for legal aid in this matter was rejected for alleged lack of merit of the claim.

3.4 The authors further state that they have not submitted the same matter to any other procedure of international investigation or settlement.

The State party's observations on admissibility

4.1 The State party argues that the communication is inadmissible for non-exhaustion of domestic remedies. One author, Ms. Diallo, has not appealed the judgement of the Administrative Tribunal of Poitiers of 19 June 1996, whereas two other authors, Ms. Doumbouya and Ms. Bathily have not appealed the refusal of their claim by the Administrative Tribunal of Paris on 15 April 1996. The other authors having appealed the refusal of their claims, have not awaited the outcome of their appeals before presenting the communication to the Committee.

4.2 The State party also claims that the communication is inadmissible ratione materiae because the right to a pension is not protected by the Covenant on Civil and Political Rights.

4.3 The State party recalls its interpretative declaration[1] made upon ratifying the Optional Protocol, and argues that the communication is inadmissible ratione temporis, since it has its origin in acts or events before 17 May 1984, the date on which the Optional Protocol entered into force for France.

4.4 With regard to the authors' complaint, the State party explains that according to the law, the right to a pension is suspended when the beneficiary loses the French nationality. In other words, any former soldier who served in the French army and later lost his nationality, no longer has a right to a pension. However, in recognition of the services rendered by the former soldiers of African origin, the law provides the possibility of granting an annuity to those who used to be entitled to a pension and later became nationals of the independent African States.

4.5 With regard to the specific situation of the widows of these soldiers, who now seek survivors' pensions, the State party notes that the personal character of the annuities opposes itself in principle to any reversion. Nevertheless, according to decrees based on paragraph III of article 71 of 1 January 1961, widows whose husband died before 1 January 1991, benefit of a survivors' pension. The State party rejects the authors' complaint that the annuities have been frozen at the level of 1 January 1975, and states that they have been increased with 4,75 per cent on 1 September 1994. As to the invalidity pensions and retirements pensions, they have been adjusted regularly since 1971. Moreover, in 1993, the military pensions for beneficiaries residing in Senegal were revised and increased. On 1 January 1995, the invalidity pensions were increased with 14,55 per cent and the retirement pensions with 24,1 per cent. The State party concludes that the authors' claim should be rejected for lack of merit.

Counsel's comments

5.1 With regard to the exhaustion of domestic remedies, counsel states that the application of domestic remedies has been unreasonably prolonged. Moreover, the refusal of France to implement the Committee's Views in case No. 196/1985, renders domestic remedies ineffective. Counsel recalls further the advise given by the Conseil d'Etat and the refusal of legal aid to the authors for apparent lack of merit of their claim and argues that in the circumstances, the ineffectiveness of domestic remedies is clear. At the end of the day, the claim would have to be decided by the Conseil d'Etat who already has given a negative advise, and it cannot be expected that the Conseil d'Etat would change its opinion when seized of the case for decision.

5.2 As to the State party's claim that the communication is inadmissible ratione materiae and ratione temporis, counsel refers to the Committee's decision in case No. 196/1985, where the Committee rejected the State party's arguments in this respect.

5.3 Counsel maintains his claim of discrimination, and states that the adjustments of the annuities signify next to nothing.

5.4 By further submission of 16 March 2000, counsel informs the Committee that in July 1999 the Administrative Court of Appeal in Paris and Bordeaux allowed his appeals on behalf of the authors. In this context, he states that his appeals invoked article 1 of Protocol No. 1 of the European Convention. The Minister of Defence and the Minister of Finance have appealed the judgments to the Court of Cassation (Conseil d'Etat).[2]

5.5 Counsel also complains that the State party requests a tax of 100 FF, and that some of his clients have not been able to pay the tax, whereupon their appeal was declared inadmissible. In this context, counsel states that the tax can only be paid in France.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has challenged the admissibility of the communication for non-exhaustion of domestic remedies, as the authors have not awaited the outcome of their appeal, and some of them have failed to appeal the refusal of their claim. It notes also that counsel first claimed that domestic remedies were not effective, given the opinion by the Conseil d'Etat of 15 April 1996, but that it appears from a recent letter by counsel that the appeals on behalf of his clients were allowed, and that the cases are now pending before the Court of Cassation (Conseil d'Etat). In the circumstances, the Committee is of the opinion that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 5 (2) (b) of the Optional Protocol;

(b) that this decision shall be communicated to the State party and to the authors' representative;

(c) that this decision may be reviewed, under rule 92 (2) of the Committee's rules of procedure, upon written request by or on behalf of the authors containing information to the effect that the reasons for inadmissibility no longer apply.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The text of the declaration reads: "France interprets article 1 of the Protocol as giving to the Committee the competence to receive and consider communications from individuals subject to the jurisdiction of the French Republic who claim to be victims of a violation by the Republic of any of the rights set forth in the Covenant which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Republic, or from a decision relating to acts, omissions, developments or events after that date."

[2] According to counsel, other cases, which were presented by one of his colleagues and were based on article 26 of the Covenant, were thrown out by the Courts of Appeal.

C. Communication No. 772/1997, Y. v. Australia
(Decision adopted on 17 July 2000, sixty-ninth session)*

Submitted by:	Mr. Colin Mc Donald and Mr. Nicholas Poynder on behalf of Mr. Y (Name deleted)
Alleged victim:	Mr. Y
State party:	Australia
Date of the communication:	25 October 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 July 2000,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Colin McDonald, legal counsel. He presents the communication on behalf of Mr. Y, ethnic Chinese and born in 1951 in Vietnam. Counsel claims that Mr. Y is a victim of violations by Australia of articles 10, paragraph 1, as well as articles 9, paragraph 3, and 14, paragraphs 3 (a), (b), and (d), in conjunction with article 2 (1) of the Covenant. As of 7 September 1998, the conduct of the case was taken over by another counsel, Mr. Nicholas Poynder.

The facts as submitted by counsel

2.1 Counsel explains that Mr. Y is ethnic Chinese and that he was resettled from Vietnam, where he was born, to China in 1979. In China he had no work and no housing. In October 1994, he left China as captain of a boat codenamed the Albatross, together

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. P.N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Ms. Elizabeth Evatt did not participate in the examination of the case.

with 117 other Sino-Vietnamese. On 12 November 1994, the ship was intercepted in Australian waters and taken to Darwin. Upon arrival in Darwin, on 13 November 1994, the passengers were taken into custody under section 189 (2) of the Migration Act 1958. On 15 November 1994, they were transferred to the Port Hedland Detention Centre in Western Australia.

2.2 From 15 November to 11 December 1994, Mr. Y and the other passengers of the Albatross were detained in a quarantine block that was separated from the rest and were thus isolated from all other detainees. From 15 to 19 November 1994, each of the detainees was interviewed by immigration officials. During this time, they were not informed that they had a right to legal counsel, nor were they provided with any legal counsel. On 11 December 1994, Mr. Y and his co-passengers were moved to an open block within the detention centre.

2.3 On 6 January 1995, some of the Albatross detainees requested access to a lawyer. There is no indication, however, that Mr. Y requested such access.

2.4 On 13 February 1995, Port Hedland's manager informed Mr. Y and other detainees that, following a Memorandum of Understanding between Australia and China on 25 January 1995, Parliament had designated China a 'safe country' for purpose of all Vietnamese nationals who had resettled in China.[1] The provision had retro-active effect as of 30 December 1994. According to sections 91A to 91F of the Migration Act persons from designated safe countries are not allowed to apply for refugee status in Australia.

2.5 Mr. Y first saw a legal adviser on 17 February 1995. Counsel points out that by that time he was unable to apply for refugee status, as a consequence of the amendment which had been passed by Parliament. On 22 February 1995, Mr. Y and others filed an application in the Federal Court of Australia against the Minister for Immigration and the Commonwealth of Australia. They alleged that they had been denied procedural fairness in so far as they had not been advised of their right to request access to a legal adviser, and thus had lost their opportunity to apply for refugee status.

2.6 On 27 July 1995, the application was dismissed on the ground that there is no statutory obligation under Australian law for an Immigration Officer to inform non-citizens who enter Australia illegally of their rights to legal advice. On the facts, the Court found that there was no evidence that any of the Albatross people had indicated that they were seeking asylum in Australia or that they had otherwise invoked Australia's protection obligations, either during the boarding of their ship by immigration officers or during the interviews conducted at Port Hedland detention centre between 15 and 19 November 1994. The Court further found that there was no evidence that any of the Albatross people had requested to see a lawyer before 30 December 1994.

2.7 On 16 August 1995, Mr. Y and others filed a notice of appeal with the Full Federal Court of Australia, and on 28 February 1996 the Court, by majority, dismissed the appeal. Other than the first instance Court, the majority of the Full Federal Court found that factors such as the circumstances of their arrival, their having previously been refugees from Vietnam, their concern to travel on rather than return to China if denied entry, the claims of no employment or housing

in China showed by implication that the Albatross people sought to claim Australia's protection obligations in a Convention sense. However, the presence of an implied claim could not lead to a finding in their favour, because the law requires the completion of a specific application and it could not be said that a constructive application had been made. The Full Federal Court confirmed the High Court's finding that there was no statutory obligation to facilitate obtaining legal advice without the applicants asking for it. Mr. Y's application with the High Court of Australia for special leave to appeal was dismissed on 16 April 1996.

2.8 On 11 May 1996, Mr. Y was deported from Australia to China.

The complaint

3.1 Counsel makes claims relating to the period in which Mr. Y was placed in quarantine detention and to the failure of the State party to inform Mr. Y of his right to seek legal advice.

3.2 He claims violations of article 9, paragraph 3, article 10, paragraph 1 and article 14, paragraphs 1 and 3 (a), (b) and (d).

State party's observations

4.1 By submission of 30 September 1998, the State party explains that Mr. Y was classified on arrival as an 'unlawful non-citizen' for the purposes of the Migration Act 1958 and taken into immigration detention under section 189 (2) of the Act. Under the Act, no obligation exists to advise those detained under section 189 (2) that they may apply for a visa of any type, to provide any opportunity to apply for a visa or to allow access to advice in connection with an application for a visa. However, under section 156 of the Act, the Department of Immigration is under an obligation to facilitate access to legal advice whenever a person detained under section 189 (2) so requests. Publicly funded legal assistance is provided where the Department considers that a person, prima facie, may engage the protection obligations of Australia under the Refugees Convention.

4.2 The State party explains that on 15 November 1994, new provisions of the Migration Act came into operation, providing that certain persons from designated 'safe third countries' are excluded from making an application for a Protection Visa under the Act. On 25 January 1995, the Australian Government entered into a Memorandum of Understanding with the Government of China. The Memorandum provides that, subject to verification procedures, Vietnamese refugees settled in China who subsequently arrive in Australia without authorisation will be returned to China and continue to receive the protection of the Government of China. On 17 January 1995, the migration regulations were amended to designate China as a safe third country for Vietnamese nationals who had resettled in China as refugees. On 17 February 1995, the Migration Legislation Amendment Act (No.2) 1995 rendered invalid any visa applications made by Sino-Vietnamese between 30 December 1994 and 27 January 1995. In this context, the State party notes that Mr. Y is of Sino-Vietnamese origin and had not made an application for a Protection Visa before 30 December 1994 and was precluded from doing so after that date pursuant to the operation of the above mentioned statutory amendments.

4.3 While in accordance with the Committee's rules of procedure the State party has addressed counsel's arguments on the merits, the State party raises a preliminary argument regarding the admissibility of the communication. The State party argues that, in the absence of a written power of attorney, the communication is inadmissible ratione personae, since counsel has no standing to act on Mr. Y's behalf. In this connection, the State party refers to rule 90 of the Committee's rules of procedure and argues that a representative should be duly authorized. The State party notes that there is no evidence that Mr. McDonald received instructions from Mr. Y to act on his behalf or that Mr. Y expressly authorized him to do so. Moreover, the State party notes that counsel himself acknowledges that he is not aware of Mr. Y's current address. The State party submits that counsel cannot act on Mr. Y's behalf when he has no means of contacting him or receiving instructions from him. The State party further argues that there is no evidence of a sufficiently close relationship between counsel and Mr. Y to justify counsel acting without express authorization. The State party therefore requests the Committee to declare the communication inadmissible under article 1 of the Optional Protocol.

Counsel's comments

5.1 By submission of 4 January 1999, counsel comments on the State party's submission on the issue of admissibility. As to the question of standing, counsel attaches a statutory declaration, dated 4 January 1999, by himself in which he declares having met Mr. Y in June 1995 when attending the Federal Court hearings in Perth as an observer. Afer that, he received at least one telephone call from Mr. Y, during which his proceedings were discussed. On 17 April 1996, after the High Court dismissed the application for special leave to appeal, counsel initiated a telephone conversation with Mr. Y through an interpreter, of which he attaches the transcript. From the transcript, it appears that he requested Mr. Y's permission to present his case to the United Nations, to which Mr. Y replied that he had no objection. The same day, counsel confirmed the contents of the telephone conversation in a letter to Mr. Y. With the letter, he included a written authority to be signed by Mr. Y. According to counsel, Mr. Y did in fact sign the written authority and returned it to counsel, who subsequently misplaced it and it now appears to be lost. On 8 May 1996, counsel spoke to Mr. Y again and asked his permission to have Mr. Colin McDonald work on his case.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party has challenged the admissibility of the communication on the grounds that it was not submitted by the victim of the alleged violations of the Covenant. The Committee notes that the lawyer who submitted the communication did not represent Mr. Y in the proceedings before the domestic courts nor has he produced a power of attorney in writing to act on Mr. Y's behalf. As to the telephone conversation between counsel and Mr. Y (a transcript of which has been provided to the Committee), it transpires that counsel told Mr. Y that he wished to address a question of principle to the Human Rights Committee (whether the State party has an obligation to inform unlawful entrants into Australia of their right to consult a lawyer) and asked whether Mr. Y would agree to counsel submitting a communication in Mr. Y's name in

order to test this question. According to the transcript, counsel made it clear that the said communication would not affect Mr. Y himself (for the good or bad) and all Mr. Y said was that he had no objection to counsel submitting such a communication. Although 24 days elapsed between the said telephone conversation and Mr. Y's deportation counsel never received instructions from Mr. Y as to the subject matter of the communication. Counsel has lost contact with Mr. Y since the latter's deportation from Australia.

6.3 The Committee has always taken a wide view of the right of alleged victims to be represented by counsel in submitting communications under the Optional Protocol. However, counsel acting on behalf of victims of alleged violations must show that they have real authorization from the victims (or their immediate family) to act on their behalf, that there were circumstances which prevented counsel from receiving such authorization, or that given the close relationship in the past between counsel and the alleged victim it is fair to assume that the victim did indeed authorize counsel to proceed with a communication to the Human Rights Committee. The Committee is of the opinion that in the present case counsel has failed to show that any of these conditions apply. The Committee is therefore of the opinion that counsel has not shown that he may act on behalf of Mr. Y in submitting this communication. The communication does not meet the requirement of article 1 of the Optional Protocol that a communication be submitted by a victim of an alleged violation. The Committee therefore holds it to be inadmissible.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 1 of the Optional Protocol;

(b) that this decision shall be communicated to the State party and to counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] The text of the Memorandum of Understanding reads inter alia: "Both parties agreed that for the recent and possible future unauthorized arrivals in Australia of Vietnamese refugees settled in China they will, ..., engage in friendly consultations and seek proper settlement of the issue through agreed procedures. To this end, Vietnamese refugees settled in China returned under agreed verification arrangements, will continue to receive the protection of the Government of China".

D. Communication No. 777/1997, Sánchez López v. Spain
(Decision adopted on 18 October 1999, sixty-seventh session)*

Submitted by:	Antonio Sánchez López (represented by José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	22 October 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 October 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Antonio Sánchez López, a primary schoolteacher living in Molina de Segura, Murcia, Spain. He claims that he is a victim of a violation by Spain of article 14, paragraph 2 and 3 (g), of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. José Luis Mazón Costa.

The facts as submitted by the author

2.1 On 5 May 1990, the author was driving his car at 80 km/h in an area where the speed limit was 60 km/h. The car was photographed after being detected by the police radar. The General Department of Traffic (Ministry of the Interior) asked him, as the owner of the vehicle by means of which the offence had been committed, to identify the perpetrator of the offence or driver of the vehicle, in other words, himself. This request was made on the basis of article 72 (3) of Royal Legislative Decree No. 339/1990 (Road Safety Act - Ley de Seguridad

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Roman Wieruszewski, and Mr. Maxwell Yalden.

Vial (LSV)), which states: "The owner of the vehicle, on being duly asked to do so, has the duty to identify the driver responsible for the offence; if he fails to fulfil this obligation promptly without justified cause, he shall be liable to a fine for having committed a serious misdemeanour".

2.2 Pursuant to this request and exercising the fundamental right not to confess guilt, Mr. Sánchez López sent the traffic authorities a letter in which he stated that he was not the driver of the vehicle and did not know who had been driving it since he had lent it to several people during that period. As the perpetrator of a serious misdemeanour, he was fined 50,000 pesetas (the speeding fine was 25,000 pesetas).

2.3 The author took his case to the courts (Administrative Litigation Division, Murcia), claiming that the imposition of the fine constituted a violation of his fundamental rights, in particular the right to presumption of innocence, the right not to confess guilt and the right not to testify against oneself, all of which are recognized in article 24 (2) of the Spanish Constitution. He also requested that an action of unconstitutionality should be brought before the Spanish Constitutional Tribunal. The competent Division rejected the appeal, stating that the penalty was lawful.

2.4 The decision was the subject of an action for amparo before the Constitutional Tribunal, which, in a substantiated decision of 2 February 1996, dismissed the appeal, citing the doctrine established in another decision adopted on 21 December 1995 by that Tribunal in plenary resolving a number of questions of unconstitutionality raised by judicial bodies concerning article 72 (3) of the LSV.

2.5 Counsel maintains that the decision is contradictory in that it recognizes the fundamental right not to testify against oneself as an integral part of the Spanish Constitution, a right which is also applicable to punitive procedures resulting from failure to comply with administrative provisions of the State. It is nevertheless seriously contradictory in stating that the duty imposed on the vehicle owner who is compelled to reveal or identify the name of the driver when it is himself does not constitute a violation of the fundamental right not to confess guilt. The decision comprises a separate opinion signed by two judges stating that without doubt the fundamental right not to testify against oneself is violated by article 72 (3) of the LSV.

The complaint

3.1 Counsel maintains that the author has been the victim of a violation of article 14, paragraph 3 (g), of the Covenant in that he has been obliged to confess guilt to the extent that the request for identification was addressed to the owner of the vehicle, who was in fact the driver responsible for the offence. In this case he is being obliged to make a self-accusatory statement, which contravenes the right protected in the Covenant.

3.2 He further maintains that one of the fundamental elements of the presumption of innocence (article 14 paragraph 2), namely that the burden of proof rests on the prosecution and

not the defence, has been violated since the action required from the author by the authorities is equivalent to proof of his innocence. It is in fact incumbent on the authorities themselves to identify the driver presumed to be responsible for the offence.[1]

3.3 This complaint has not been submitted to any other international settlement procedure.

State party's information and observations, and counsel's comments

4.1 In its statement dated 19 January 1998 on the admissibility of the case, the State party requested that it should be declared inadmissible on the basis of article 5, paragraph 2 (a), of the Optional Protocol since, in its view, the present communication is identical to a communication submitted by the same counsel to the European Court of Human Rights. The State party nevertheless informs the Committee that it will reply as to the merits of the question within the time limit set.

4.2 In its submission, dated 20 May 1998, concerning the merits of the case, the State party reiterates its request that the complaint should be declared inadmissible. The facts are not contested by the State party but it considers that there has not been a violation of any of the rights protected in the Covenant, since the potential danger constituted by a motor vehicle requires that road traffic should be rigorously protected.

4.3 It further draws attention to the obligation under Spanish law whereby the offence should be "personalized". The offence cannot automatically be attributed to the owner of the vehicle, and so the law requires that the perpetrator of the offence should be personally identified. He may or may not be the owner and, if the owner of the vehicle is a juridical entity, they will certainly not be the same. Consequently, according to the State party's counsel, article 72 (3) of the LSV stipulates that the competent authority shall transmit to the owner of the vehicle a communication concerning the complaint (for speeding) and request him to inform the Department of Traffic of the name and address of the driver, with a warning that, if he fails to do so, he will, as owner, be regarded as having failed to fulfil the duty of cooperation. Although the owner of the car replied that he did not know who had been driving it on the day in question, he gave a list of 17 possible drivers. The administrative authorities took the view that this reply did not amount to proper fulfilment of the duty of cooperation with the authorities and, after the relevant administrative formalities, proceeded to fine Mr. Sánchez 50,000 pesetas for having committed a serious misdemeanour. The State party maintains that the penalty was imposed on the perpetrator for his failure to perform the legal duty imposed by the LSV on the owner of a vehicle to identify the driver responsible for the offence, and not as a consequence of the fine for speeding, which was dropped. In addition, the State party considers that the author was punished after proceedings comprising the author's pleadings and all procedural safeguards, proceedings which were the subject of a judicial review, were adversarial, and were confirmed by the Constitutional Tribunal.

4.4 As regards the possible violation of article 14, paragraph 2, of the Covenant (presumption of innocence), the State party's counsel considers that, since the Constitutional Tribunal rejected the arguments on the grounds that they were not substantiated, this constitutes non-exhaustion of domestic remedies and the complaint should be declared inadmissible. In this connection, the

State party's counsel says that the author appears to confuse the presumption of innocence in respect of the punitive process for the traffic offence (the said process having been dropped) with the punitive process for failure to cooperate with the authorities.

4.5 As to the alleged violation of article 14, paragraph 3 (g), of the Covenant, the author considers that the provision in question obliges him to testify against himself or confess guilt contrary to the provisions of the Covenant. The State party's counsel affirms that, in accordance with the decision of 21 December 1995, the Constitutional Tribunal has ruled that "the principles underlying the penal legislation are applicable, with certain nuances, to administrative law relating to penalties". The Tribunal also draws attention to "the caution which should be exercised when the essential guarantees relating to procedure and directly related to criminal proceedings are transferred to the administrative sphere in respect of penalties, since this operation cannot be effected automatically, given the differences existing between the two types of procedures".

4.6 As to the case under consideration, the penalty imposed on the author is not the consequence of any infringement of traffic regulations, but is the consequence of the offence committed by the owner of the vehicle vis-à-vis the duty to cooperate required by law of any vehicle owner. This obligation derives from the potential risk which the use of a motor vehicle may entail for the lives, health and safety of individuals. To this should be added, according to the State party's counsel, the requirement that the penalty should be personalized, which imposes on the authorities the obligation to assign responsibility for the infringement of a traffic regulation to the perpetrator of the infringement, i.e. the driver of the vehicle at a particular moment and not the owner of the vehicle.

4.7 According to the State party's counsel, the duty to cooperate, set forth in article 72 (3) of the LSV, in no way obliges the vehicle owner to make a statement on the alleged traffic violation admitting his guilt or assuming responsibilities. In this connection he adds that the Constitutional Tribunal has made it clear that, although the provision reads "identify the driver responsible for the offence", this wording is "technically infelicitous" since the purpose of the duty of cooperation is to identify not the person responsible, but only the person who was driving the vehicle. It is, therefore, to this person that the authorities have to address themselves through the punitive procedure of article 73. After concluding the appropriate procedure with all the constitutional and legal safeguards, it is incumbent on the authorities to establish whether or not the person identified was responsible for the offence.

5.1 The author's counsel rejects the claim of inadmissibility entered by the State party: although the complaint submitted to the European Commission of Human Rights relates to the same matter, in that complaint the offence, the victim and, of course, the Spanish judicial decisions, including the relevant application for amparo, were not the same.

5.2 With regard to the State party's submissions on substance, the author's counsel reiterates his allegations of violations of article 14, paragraphs 2 and 3 (g), of the Covenant. He thus reiterates that article 73 (2) of the LSV raises no problem when the driver of the vehicle is not the owner, but that the situation is different if he is the owner since he is compelled, as owner, to

testify against himself in having to identify the driver as himself. The State party's defence is based on denying the literal sense of the provision violating the Covenant, claiming that it says something that it does not say.

5.3 As to the argument concerning the need to protect society against the danger of motor vehicles, the author's counsel explains that the State party could fulfil the obligation to personalize the offence by identifying the driver at the time of the offence, through the use of two police vehicles, one with the radar and the second stopping the vehicle, as is the current practice of the Spanish police. This practice, which, according to counsel, is now general, reinforces the submission concerning the incompatibility of the provision contained in article 72 (3) of the LSV with the right not to confess guilt, as protected by the Covenant.

5.4 On the question of the violation of the presumption of innocence covered by article 14, paragraph 2, of the Covenant, counsel maintains that there has been a violation of this right by the State party since it has inverted the burden of proof incumbent on the prosecutor (the traffic authorities, in this case); the authorities have in fact required the owner to prove who was driving the vehicle. As to the State party's argument that the author cannot invoke this right since he did not do so before the national courts, counsel dismisses the argument since the question was raised before the Constitutional Tribunal, which rejected it, according to counsel, because of the excessive formalism of the Tribunal, which was unwilling to go into the merits of the case.

Admissibility considerations

6.1 Before considering any claims contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to article 5, paragraph 2 (a), of the Optional Protocol, the Committee cannot accept the State party's contention that "the same matter" has already been submitted to the European Court of Human Rights because another person brought his particular case before that body in connection with an apparently identical claim. The words "the same matter", within the meaning of article 5, paragraph 2 (a), of the Optional Protocol, must be understood as referring to one and the same claim concerning the same individual, as submitted by that individual, or by some other person empowered to act on his behalf, to the other international body. Since the State party has itself acknowledged that the author of the present communication has not submitted his specific case to the European Court of Human Rights, the Human Rights Committee considers that it is not precluded from considering the communication under article 5, paragraph 2 (a), of the Optional Protocol.[2]

6.3 The Committee observes that, for the purposes of the Optional Protocol, all available domestic remedies have been exhausted with the rejection of the amparo application by the Constitutional Tribunal. In this regard, the Committee has taken note of the fact that the State party challenges the admissibility of the claim of a violation of the presumption of innocence (article 14, paragraph 2) on the ground of failure to exhaust domestic remedies. The Committee also takes note of the written information before it stating that the alleged violation of the presumption of innocence was brought to the attention of the Constitutional Tribunal and that the

latter rejected the claim. The Committee considers that, in accordance with article 5, paragraph 2 (b), of the Optional Protocol, there is nothing in the circumstances of the case to prevent it from considering the communication.

6.4 With regard to the claim that the author's rights to the presumption of innocence and the right not to testify against himself as protected by article 14 paragraph 2 and 3 (g) of the Covenant were violated by the Spanish State, since he had to identify the owner of the vehicle reported for committing a traffic offence, the Committee considers that the documentation in its possession shows that the author was punished for non-cooperation with the authorities and not for the traffic offence. The Human Rights Committee considers that a penalty for failure to cooperate with the authorities in this way falls outside the scope of application of the above-mentioned paragraphs of the Covenant. Accordingly, the communication is held to be inadmissible under article 1 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 1 of the Optional Protocol.

(b) that this decision shall be communicated to the State party and to the author's counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] In this respect he cites a decision of the European Court of Human Rights, Oztürk v. Germany case, adopted on 21 February 1984, series A, No. 73, in which it is established that the guarantees contained in article 6 of the European Coventiao and for defendants are fully applicable to punitive adminisrative procedures when the State itself has recognized this set of regulations for any punitive procedure, even though a custodial penalty is not automatically applicable.

[2] See communication No. R.18/75 (Faneli v. Italy).

E. Communication No. 785/1997, Wuyts v. The Netherlands (Decision adopted on 17 July 2000, sixty-ninth session)*

Submitted by:	Mr. Alexandre Wuyts (represented by Mr. E. Th. Hummels, legal counsel)
Alleged victim:	The author
State party:	The Netherlands
Date of the communication:	24 June 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 July 2000,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Alexandre Wuyts, a Belgian citizen born on 22 February 1974. He claims to be a victim of a violation of article 10 of the Covenant by the Netherlands. He is represented by Mr. E.Th. Hummels.

The facts as submitted

2.1 On 11 February 1994, the author was convicted on several counts of theft with use of violence or threat of violence against persons, as well as attempts and threats of serious physical abuse. He was sentenced to eight months of imprisonment and ordered to be detained at her Majesty's pleasure for compulsory treatment in a psychiatric hospital. The initial detention was set at two years, renewable. According to the judgement, the author's treatment was to begin on 3 March 1994, but according to counsel it did not actually begin until 17 March 1995, more than one year later. During that period, the author was detained without any treatment.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. P.N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, and Mr. Abdallah Zakhia.

2.2 On 6 February 1996, the District Court in Middelburg ordered the renewal of the author's treatment for two years. It considered that the psychiatric reports showed that the author's condition had not improved and that he refused anti-psychotic medication. On appeal, on 19 June 1996, the Court of Appeal in Arnhem confirmed the District Court's decision.

The complaint

3. Counsel argues that the author is a victim of a violation of article 10 of the Covenant, since he was kept in detention without treatment for over a year, although the treatment had been ordered by the Court. He also argues that if the treatment would have started on time, it would not have been necessary to renew his confinement. According to counsel, in the circumstances any further treatment should be on a voluntary basis only, and the confinement of the author therefore violates the inherent dignity of the human person and thus article 10 of the Covenant.

State party's observations on the admissibility of the communication and counsel's comments thereon

4.1 In its submission of 10 April 1998, the State party explains that on 3 March 1994, the date on which the author's treatment should have started, there was no place available in any of the hospitals. He was therefore kept at the intensive supervision unit of the detention centre. On 20 December 1994 he was placed in the clinic of the Meijersinstituut in Utrecht, as a provisionary measure, and on 17 March 1995 he was transferred to the Van der Hoevenkliniek in Utrecht. The State party contests therefore the author's allegation that he had to wait for over a year before being placed in a hospital, since in fact the waiting period was nine and a half months. The State party also informs the Committee that the compulsory treatment was again renewed for two years by decision of the court of 24 February 1998.

4.2 The State party submits that on 20 March 1997, the Hague Appeal Court has decided in a case similar to the author's that the State has to pay Fl. 150 for each day exceeding three months that a person whose compulsory psychiatric treatment has been ordered by the courts, remains in detention without receiving such treatment. The State has appealed this judgement in cassation, and the appeal is pending [1] Following the judgement, the author's counsel requested compensation from the State on 21 March 1997, and on 20 June 1997, the State has offered him Fl. 3,000. The State party explains that, awaiting the judgement in cassation, it does not accept accountability, and it is only willing to pay the Fl. 3,000 if the complainant promises not to initiate any other procedures against the State.

4.3 According to the State party, the communication is inadmissible under article 5 (2) (b) of the Optional Protocol, since the negotiations concerning compensation for the time spent in detention awaiting placement in a psychiatric hospital are ongoing. If no agreement is reached, the author can go to court and request compensation. According to the State party, the courts have granted payment of compensation in numerous similar cases.

5. In his comments, counsel notes that the Meijersinstituut is not a psychiatric hospital but a selection institute. He further argues that all domestic remedies have been exhausted, since the author has appealed the judgement by the Middelburg District Court to extend his compulsory treatment with two years, invoking article 10 of the Covenant. His appeal was rejected by the

Court of Appeal, because it considered the period of detention awaiting placement as undesirable but not a violation of article 10 of the Covenant. Counsel adds that the author cannot be expected to initiate all sorts of civil procedures in this respect.

The State party's observations on the merits of the communication and counsel's comments

6.1 By submission of 20 July 1998, the State party addresses the merits of the communication. It distinguishes two different questions, one: was the treatment the author underwent during his detention while waiting to be placed in the psychiatric hospital incompatible with the requirements of article 10 (1) of the Covenant? and two: Is it incompatible with treatment "with humanity and with respect for the inherent dignity of the human person" that the compulsory treatment order could not take immediate effect?

6.2 With regard to the first question, the State party notes that the author was kept in a secure hospital unit in the remand centre, an "Individual Supervision Unit", which housed detainees with psychological problems. This unit provides special, problem-oriented care with due regard for the individual problems of the detainees. Each detainee has his own cell, with a bed, toilet and wash basin, and generally also a television. Moreover, the unit has a common room with recreational facilities. Daily schedules are tailored to the detainees' needs. Staffing levels are higher than customary in the other wings of the remand centre in order to allow for a great deal of social contact with the detainees and the staff has received special training. Each detainee's condition is monitored carefully and as soon as there is any sign of undesirable developments, a psychologist is alerted, who when necessary may call a psychiatrist. In case of a crisis, placement is secured in a Forensic Observation and Supervision Unit, which however did not prove necessary in the author's case. The State party concludes that the conditions of the author's detention were compatible with the requirements of article 10·(1) of the Covenant.

6.3 With regard to the second question, the State party argues that the time the author spent waiting before being placed in a psychiatric hospital cannot be classified as a condition of detention, to which article 10(1) would be applicable. According to the State party, this part of the communication should be declared inadmissible as being outside the scope of article 10 of the Covenant.

6.4 In addition, the State party notes that the author is disputing the lawfulness of his detention. However, according to the State party the question whether or not the detention was lawful is irrelevant for the determination of a violation of article 10 of the Covenant, which deals with humane treatment during (lawful or unlawful) detention. On the lawfulness, the State party refers to the judgement of the Supreme Court of 5 June 1998, in a case similar to the author's, in which the Court held that the Minister of Justice was under no obligation, under the terms of the Hospital Orders (Enforcement) Regulations to ensure that all necessary capacity for persons subject to a hospital order was available at all times. The Regulations state that the Minister must take a decision on the placement in a psychiatric hospital unit "as soon as possible". The Supreme Court considered that "a certain friction between available and necessary capacity" was acceptable from the point of view of an efficient deployment of financial resources. The Court ruled that a six months' waiting period may be regarded as acceptable to society. If a person's stay in a remand centre is prolonged beyond six months, the Supreme Court considers this to be unlawful unless special circumstances apply.

6.5 The State party points out that the unlawfulness does not relate, according to the Supreme Court, to the continued deprivation of the person's liberty, but to the failure to begin treatment in an appropriate institution within due time. In such cases, compensation is in order.

6.6 The State party therefore contests the author's claim that his compulsory treatment has become unlawful because of the delay in beginning the treatment. If the author feels that he has been harmed by the prolonged delay in the treatment, he can still file a claim with the court for compensation against the State.

7 In his comments, counsel argues that article 10 encompasses the positive duty of the State party to provide psychiatric treatment to a person who has been ordered to such treatment by the court. No such treatment was provided in the remand centre. With respect to the remedy, counsel argues that compensation is not equal to adequate protection, and that the State party's reasoning is an implicit confession of a violation of article 10.

8.1 In a further submission, the State party contests counsel's statement that the Meijersinstitute is a selection institute rather than a treatment centre. It has been designated by the Minister of Justice as a centre for care of persons subject to a hospital order. In practice, the institute has a double function. It acts as a selection centre in the sense that it observes persons on whom a hospital order has been imposed for a period of seven weeks in order to be able to advise the Minister of Justice as to the most suitable institution for the person in question. Where desirable, it also provides treatment. In the present case, the author received immediate treatment when he was admitted to the institute pending his placement in the Van der Hoeven clinic.

8.2 The State party joins a judgement of 7 April 1993 by the President of the Groningen District Court in a case similar to the author's. In that case, the applicant had requested the court to order the State to place him in a psychiatric hospital within two weeks in order to begin the compulsory treatment. The Court granted his request. According to the State party, this shows that effective remedies would have been available to the author.

9. In his comments, counsel reiterates that the Meijersinstitute is a selection institute, and not suitable for real treatment, even if short term treatment is provided. He further argues that the judgement of the President of the Groningen District Court is irrelevant to the author's case.

Issues and proceedings before the Committee

10.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

10.2 Two issues are before the Committee: one, whether the State party's failure to place the author without delay in a psychiatric hospital for treatment constitutes a violation of article 10 for the duration of the delay, and two, whether the author's continued compulsory treatment and confinement constitutes a violation of article 10 because of the delay in beginning the treatment.

10.3 With respect to the first issue, the Committee notes that the State party has argued that the author has failed to exhaust domestic remedies, since he could have gone to court to request placement in a psychiatric hospital, and failing that, compensation. Counsel's argument that the author has exhausted domestic remedies because he challenged the renewal of his compulsory treatment order on the basis that it constituted a violation of article 10, only relates to the second issue before the Committee. The Committee has taken note of the fact that the courts in the Netherlands in cases similar to the author's have granted requests for immediate placement in a psychiatric hospital, and subsidiarily compensation, and considers that this recourse provided an effective remedy available to the author. His failure to avail himself of this remedy, renders this part of the communication inadmissible under article 5 (2) (b) of the Optional Protocol.

10.4 The Committee considers that the author has exhausted domestic remedies with regard to the second issue. However, the Committee considers that neither counsel's arguments nor the material before it substantiate, for purposes of admissibility, that the author's prolonged compulsory confinement in a psychiatric hospital amounts to a violation of article 10 of the Covenant. Under the circumstances, this part of the communication is inadmissible under article 2 of the Optional Protocol.

10.5 The Committee notes that the facts of the present case could have raised issues under article 9 of the Covenant. However, since this matter has not been raised by the parties, the Committee is not in a position to pronounce itself on this question.

11. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol;

(b) that this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] For the Supreme Court's judgement in cassation, see para. 6.5 below.

F. Communication No. 807/1998, Koutny v. Czech Republic (Decision adopted on 20 March 2000, sixty-eighth session)*

Submitted by:	Mr. Ota Koutny
Alleged victim:	The author and his brother Antonin
State party:	Czech Republic
Date of communication:	24 January 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 March 2000,

Adopts the following:

Decision on admissibility

1. The author of the communication is Ota Koutny, a Czech citizen currently residing in Vienna, Austria. He submits the communication on his own behalf and on that of his brother, Antonin Koutny. They claim to be victims of a violation of article 26 of the Covenant by the Czech Republic.

The facts as submitted by the author

2.1 The author's aunt and uncle, both Czech citizens, were co-owners of a house in Prague, which they purchased in 1935. After the Second World War, the property of the aunt was confiscated under Benes decree No. 108/1945 and she was deprived of her Czech citizenship for alleged hostile activities against Czechoslovakia. However, on 5 March 1947, she was acquitted of the accusations by the Extraordinary People's Court and was given back her Czech citizenship. However, by decision of 11 January 1951, the District National Council approved the confiscation of her property on the basis of Benes decree No. 108/1945. The aunt died in 1975, and the author's mother was the only heiress. The mother commenced an action for return

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Martin Scheinin, Mr. Hipolito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

of the property on 2 September 1991 at the District Court in Prague. When she died on 15 April 1992, the author and his brother continued the law suit as her heirs. On 12 September 1995, however, the Court rejected their claim, on the basis that the confiscation had taken place before 25 February 1948, the beginning of the qualifying period for the Restitution Law No. 87/1991. It appears that the Court considered that the decree of 11 January 1951 was not a new decision, but a confirmation of the decision taken in 1945 under the Benes Decree. The author's appeal against this decision was rejected on 16 February 1996, and on 24 September 1996, the Constitutional Court rejected the author's further application for review.

2.2 It appears from the communication that the author's claim for restitution also relates to the part of the property formerly owned by his uncle. It is said that this property was confiscated after the Second World War, but no precise date is given. The author's uncle died in 1961 and his aunt was the only heiress.

The complaint

3. The author complains that the Court did not take into consideration the decree of 11 January 1951, which brings the confiscation within the ambit of the Restitution Law. According to the author, the Council's decision of 1951 was a clear act of political persecution, since his aunt had been acquitted of any charges of hostile activities. The author considers himself a victim of discrimination, because he did not obtain restitution, although all the requirements of the Restitution Law had been fulfilled. In this connection, he suggests that the discrimination may be connected to his political views, since he left Czechoslovakia in 1970 for political reasons.

The State party's observations on admissibility

4.1 The State party argues that the communication should be declared inadmissible for failure to exhaust domestic remedies. The State party submits that the Constitutional Court rejected the author's application for failure to provide supplemental information as requested by the Court. According to the State party, the Constitutional Court, in accordance with section 72 of the Act on the Constitutional Court, had requested the author to specify which of the rights enumerated in the international human rights instruments covered by article 10 of the Constitution he wanted to invoke. Since neither the author nor his lawyer provided this information, the Court decided not to proceed with the case and rejected the complaint. The State party notes that the Court never dismissed the case on its merits, and suggests that the author can petition the Constitutional Court again.

4.2 The State party further argues that the right to property is not protected by the Covenant and that the communication is therefore inadmissible ratione materiae. In this context, the State party notes that the author has not mentioned any breaches of the right to fair trial or any instances of discrimination.

4.3 The State party further argues that the communication is inadmissible ratione temporis since the alleged discriminatory confiscation took place before the entry into force of the Covenant.

The author's comments on the State party's observations

5.1 In his reply, the author maintains that he has exhausted all available domestic remedies. He states that he has never been informed of any possible defect in his application to the Constitutional Court.

5.2 The author maintains that his communication is admissible ratione materiae since he is a victim of discrimination, in violation of article 26 of the Covenant.

5.3 As to the State party's argument that the communication is inadmissible ratione temporis, the author submits that he was injured in his rights by Court decisions of 12 September 1995, 16 February 1996 and 24 September 1996, all taken after the entry into force of the Covenant for the Czech Republic.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has noted the State party's objections to the admissibility and the author's comments thereon. It considers that insofar as the author claims that the decree of 11 January 1951 was discriminatory, this claim is outside the Committee's competence ratione temporis and thus inadmissible under article 1 of the Optional Protocol.

6.3 The State party has argued that the communication is inadmissible for no-exhaustion of domestic remedies, since the author's appeal to the Constitutional Court was defective. The author has challenged this, but the Committee notes from the text of the Constitutional Court's decision of 24 September 1996, that the author was informed about the defects of his appeal and given an opportunity to remedy it, which he failed to do. On this basis, the Committee concludes that the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol for failure to exhaust domestic remedies.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under articles 1 and 5 (2) (b) of the Optional Protocol;

(b) that this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

G. Communication No. 816/1998, Tadman et al. v. Canada (Decision adopted on 29 October 1999, sixty-seventh session)*

Submitted by:	Grant Tadman et al. (represented by Mr. Brian Forbes from Forbes Singer Smith Shouldice, a law firm in Ottawa, Ontario)
Alleged victim:	The authors
State party:	Canada
Date of communication:	11 April 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 October 1999,

Adopts the following:

Decision on admissibility

1.1 The authors of the communication are Grant Tadman, Sandra Johnstone, Nick Krstanovic and Henry Beissel, all Canadian citizens residing in the province of Ontario. They claim to be victims of a violation of articles 26, and articles 2 (1) (2) and (3) and 50 of the International Covenant on Civil and Political Rights. They are represented by Mr. Brian Forbes from Forbes Singer Smith Shouldice, a law firm in Ottawa, Ontario.

1.2 In the province of Ontario Roman Catholic schools are the only non-secular schools receiving full and direct public funding. The authors, however, belong to different religious denominations, i.e. United Church of Canada, Lutheran Church, Serbian Orthodox Church and Humanist. They all have children in the school going age and their children are being educated in the public school system.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Mr. M. Yalden did not participate in the examination of the case. The text of one individual opinion signed by four Committee members is appended to the present document.

The facts

2.1 The Ontario public school system offers a free education to all Ontario residents without discrimination on the basis of religion or on any other ground. Public schools may not engage in any religious indoctrination. Individuals enjoy the freedom to establish private schools and to send their children to these schools instead of the public schools. The only statutory requirement for opening a private school in Ontario is the submission of a "notice of intention to operate a private school". Ontario private schools are neither licensed nor do they require any prior Government approval. As of 30 September 1989, there were 64,699 students attending 494 private schools in Ontario. Enrolment in private schools represents 3.3 percent of the total day school enrolment in Ontario.

2.2 The province of Ontario's system of separate school funding originates with provisions in Canada's 1867 constitution. In 1867 Catholics represented 17 per cent of the population of Ontario, while Protestants represented 82 per cent. All other religions combined represented 2 per cent of the population. At the time of Confederation it was a matter of concern that the new province of Ontario would be controlled by a Protestant majority that might exercise its power over education to take away the rights of its Roman Catholic minority. The solution was to guarantee their rights to denominational education, and to define those rights by referring to the state of the law at the time of Confederation.

2.3 As a consequence, the 1867 Canadian constitution contains explicit guarantees of denominational school rights in section 93. Section 93 of the Constitution Act, 1867 grants each province in Canada exclusive jurisdiction to enact laws regarding education, limited only by the denominational school rights granted in 1867. In Ontario, the section 93 power is exercised through the Education Act. Under the Education Act every separate school is entitled to full public funding. Separate schools are defined as Roman Catholic schools. The Education Act states: "1. (1) "separate school board" means a board that operates a school board for Roman Catholics; ... 122. (1) Every separate school shall share in the legislative grants in like manner as a public school". As a result, Roman Catholic schools are the only religious schools entitled to the same public funding as the public secular schools.

2.4 The Roman Catholic separate school system is not a private school system. Like the public school system it is funded through a publicly accountable, democratically elected board of education. Separate School Boards are elected by Roman Catholic ratepayers, and these school boards have the right to manage the denominational aspects of the separate schools. Unlike private schools, Roman Catholic separate schools are subject to all Ministry guidelines and regulations. According to counsel, the additional costs to maintain the separate system next to the public school system have been calculated as amounting to $ 200 million a year for secondary schools alone. Neither s.93 of the Constitution Act 1867 nor the Education Act provide for public funding to Roman Catholic private/independent schools. Ten private/independent Roman Catholic schools operate in Ontario and these schools receive no direct public financial support.

2.5 Private religious schools in Ontario receive financial aid in the form of (1) exemption from property taxes on non-profit private schools; (2) income tax deductions for tuition attributable to religious instruction; and (3) income tax deductions for charitable purposes. A 1985 report concluded that the level of public aid to Ontario private schools amounted to about one-sixth of the average total in cost per pupil enrolled in a private school. There is no province in Canada in which private schools receive funding on an equal basis to public schools. Direct funding of private schools ranges from 0 per cent (Newfoundland, New Brunswick, Ontario) to 75 per cent (Alberta).

2.6 The issue of public funding for non-Catholic religious schools in Ontario has been the subject of domestic litigation since 1978. The first case, brought 8 February 1978, sought to make religious instruction mandatory in specific schools, thereby integrating existing Hebrew schools into public schools. On 3 April 1978, affirmed 9 April 1979, Ontario courts found that mandatory religious instruction in public schools was not permitted.

2.7 In 1982 Canada's Constitution was amended to include a Charter of Rights and Freedoms which contained an equality rights provision. In 1985 the Ontario government decided to amend the Education Act to extend public funding of Roman Catholic schools to include grades 11 to 13. Roman Catholic schools had been fully funded from kindergarten to grade 10 since the mid-1800's. The issue of the constitutionality of this law (Bill 30) in view of the Canadian Charter of Rights and Freedoms, was referred by the Ontario government to the Ontario Court of Appeal in 1985.

2.8 On 25 June 1987 in the Bill 30 case the Supreme Court of Canada upheld the constitutionality of the legislation which extended full funding to Roman Catholic schools. The majority opinion reasoned that section 93 of the Constitution Act 1867 and all the rights and privileges it afforded were immune from Charter scrutiny. Madam Justice Wilson, writing the majority opinion, stated: "It was never intended ... that the Charter could be used to invalidate other provisions of the constitution, particularly a provision such as s.93 which represented a fundamental part of the Confederation compromise."

2.9 At the same time the Supreme Court of Canada, in the majority opinion of Wilson, J. affirmed: "These educational rights, granted specifically to ... Roman Catholics in Ontario, make it impossible to treat all Canadians equally. The country was founded upon the recognition of special or unequal educational rights for specific religious groups in Ontario ..." In a concurring opinion in the Supreme Court, Estey J. conceded: "It is axiomatic (and many counsel before this court conceded the point) that if the Charter has any application to Bill 30, this Bill would be found discriminatory and in violation of ss. 2 (a) and 15 of the Charter of Rights."

2.10 In a further case, Adler v. Ontario, individuals from the Calvinistic or Reformed Christian tradition, and members of the Sikh, Hindu, Muslim, and Jewish faiths challenged the constitutionality of Ontario's Education Act, claiming a violation of the Charter's provisions on freedom of religion and equality. They argued that the Education Act, by requiring attendance at school, discriminated against those whose conscience or beliefs prevented them from sending their children to either the publicly funded secular or publicly funded Roman Catholic schools, because of the high costs associated with their children's religious education. A declaration was

also sought stating that the applicants were entitled to funding equivalent to that of public and Roman Catholic schools. The Ontario Court of Appeal determined that the crux of Adler was an attempt to revisit the issue which the Supreme Court of Canada had already disposed of in the Bill 30 case. Chief Justice Dubin stated that the Bill 30 case was "really quite decisive of the discrimination issue in these appeals." They also rejected the argument based on freedom of religion.

2.11 On appeal, the Supreme Court of Canada by judgement of 21 November 1996, confirmed that its decision in the Bill 30 case was determinative in the Adler litigation, and found that the funding of Roman Catholic separate schools could not give rise to an infringement of the Charter because the province of Ontario was constitutionally obligated to provide such funding.

The complaint

3.1 The authors argue that the fact that no religious denomination other than Roman Catholic has the right to government funding in the province of Ontario for the purposes of education constitutes a form of discrimination with reference to all other religious denominations, which are precluded from such specific government funding. In this context, counsel argues that the Human Rights Committee is not bound by the Canadian constitutional intricacies which led to the Supreme Court's conclusions.

3.2 Counsel further claims that the consequence of the Supreme Court of Canada judgments is that specific religious denominations have been deprived of a remedy in addressing the discriminatory and unequal provisions of the current Ontario Education Act.

3.3 According to counsel, two alternative solutions can be found to the existing discrimination. One, the Province of Ontario could extend government funding, on an equal basis, to all those religious/denominational groups with a substantial presence in Ontario. However, counsel considers that such a scheme would not be financially viable and would be socially divisive. He therefore proposes a second solution, that the province create a singular public system, open to all and without distinction, thereby eliminating the present inequality. In this connection, he argues that a singular public system would be highly beneficial to Ontario's pluralistic and diverse society.

State party's observations

4.1 By submission of 22 February 1999, the State party addresses both the admissibility and the merits of the authors' claim.

4.2 First, the State party argues that the communication is inadmissible because the authors are no victims of a violation of the Covenant. According to the State party this is illustrated by the remedy they are seeking: removal of public funding for Roman Catholic separate schools. In this context, the State party also notes that the authors have failed to provide specific information about their children, and how the current system violates their rights. Moreover, the authors' children already have access to the publicly funded school system, which is what they

seek as a remedy. There is no evidence that they cannot be accommodated within the existing system, and it has not been shown how they are victimized or personally affected by Ontario's constitutional obligation to provide funding to Roman Catholic separate schools. If the authors claim that the separate school system is unnecessary costly and that by eliminating it more funds would become available for students in the public system, the State party argues that this is by no means certain and that in any event, an absence of possible additional funds being invested generally in the public system is not in itself sufficient to make the authors, or their children, victims of a violation as defined under the Optional Protocol.

4.3 As to the authors' allegation under article 2 of the Covenant, the State party recalls that article 2 does not establish an independent right but is a general undertaking by States and cannot be invoked by individuals under the Optional Protocol without reference to other specific articles of the Covenant.

4.4 Alternatively, the State party rejects a violation of article 2 because a differentiation based on reasonable and objective criteria does not amount to a distinction or discrimination within the meaning of article 2 of the Covenant. For substantive arguments concerning the issue of discrimination, it refers to its arguments relating to the alleged violation of article 26 (see below).

4.5 With regard to the alleged violation of article 26, the State party contends the communication is inadmissible ratione materiae, or, in the alternative, does not constitute a violation. The State party recalls that a differentiation in treatment based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26. The State party notes that the authors themselves argue that the extension of public funding to more denominational schools would not be a proper solution, because of budget constraints and because such a scheme would be socially divisive. In the State party's opinion, the authors' acknowledgement of a fiscal and social justification serves to underscore some of the reasonable grounds for concluding that the absence of full and direct funding to all religious groups does not violate article 26.

4.6 According to the State party, the establishment of secular public institutions is consistent with the values of article 26 of the Covenant. Secular institutions do not discriminate against religion, they are a legitimate form of Government neutrality. According to the State party, a secular system is a tool which assists in preventing discrimination among citizens on the basis of their religious faiths. Public schools build social cohesion, tolerance and understanding, and the extension of public funding to all denominational schools would undermine this ability. The State party makes no distinctions among different religious groups in its public education and does not limit any religious group's ability to establish private schools.

4.7 The State party submits that there are reasonable and objective grounds for not eliminating funding to Roman Catholic separate schools in Ontario. The elimination would be perceived as undoing the bargain made at Confederation to protect the interests of a vulnerable

minority in the province and would be met with outrage and resistance by the Roman Catholic community. It would also result in a certain degree of economic turmoil, including claims for compensation of facilities or lands provided for Roman Catholic schools. Further, the protection of minority rights, including minority religion and education rights, is a principle underlying the Canadian constitutional order and militates against elimination of funding for the Roman Catholic separate schools. Elimination of funding for separate schools in Ontario would further lead to pressure on other Canadian provinces to eliminate their protections for minorities within their border.

Counsel's comments

5.1 In his comments on the State party's submission, counsel submits that the State party has admitted the discrimination, which it justifies only on the basis of its constitution. Counsel submits that the Human Rights Committee is not bound by the constitution of Canada, and that the public funding of only Roman Catholic schools, to the exclusion of all other denominational schools, constitutes a violation of article 26. In this context, counsel states that the multicultural fabric of current Canadian society strongly suggests that no longer any rationale exists for the form of flagrant discrimination in the educational laws of the Province of Ontario vis à vis one religious denomination over all other denominations.

5.2 Counsel refers to recent constitutional changes in Quebec and Newfoundland concerning educational laws. Especially, with regard to Quebec, counsel argues that its constitutional revision opens the way for constitutional change in Ontario as well. Counsel notes that the changes in Quebec did not create social tension and discord. With regard to the use by Quebec of the notwithstanding clause in the Charter in order to continue limited denominational schooling, counsel submits that this implicitly recognizes that any form of denominational schooling is effectively discriminatory. Counsel rejects the State party's claim of possible social disruption as a consequence of removing public funding for Roman Catholic separate schools, as unsubstantiated, based on Canada's history as a civilized nation. Moreover, counsel argues that economic and social factors are irrelevant for the determination of discrimination.

5.3 With regard to the State party's argument that the authors are no victims within the meaning of the Optional Protocol, counsel recalls that the authors represent individuals who are members of specific religious denominations who receive no government funding from the Province of Ontario to educate their children in accordance with their religious beliefs. Counsel rejects the State party's suggestion that they are no victims because they seek as remedy a singular public system open to all without discrimination. He recalls that in the communication two solutions were proposed, one being the extension of funding to all denominations, the other being the elimination of the present inequality by creating a singular public system. Even though the authors prefer the second solution, counsel points out that it is within the jurisdiction of the Human Rights Committee to determine the remedy for the discrimination. The authors of the communication are victims because they are being denied parallel government funding to educate their children in accordance with their religious beliefs.

5.4 Counsel states that the figures of the financial implications of separate schooling, to which he referred in his communication, originate from public reports of the Ministry of Education, and that there can be no doubt about it that the separate system creates an extra financial burden.

5.5 Counsel takes issue with the State party referring to the Roman Catholic community as a minority. He points out that the Catholic religious group is the largest in the Province of Ontario, being approximately two and a half times larger than the next faith, the United Church of Canada. In this context, counsel recalls that there is no Protestant Church or organization to parallel the Roman Catholic structure, since the denomination generally called Protestant consists of many small denominations which each have their own structure. Counsel submits therefore that the publicly funded separate schools for Roman Catholic citizens in Ontario represent in real terms a privilege to the largest religious organization in Ontario.

5.6 As regards the freedom to establish a private religious school, counsel argues that this is a hollow right unless one is comparatively wealthy and is prepared to pay taxes under the educational levy while at the same time paying for one's own children from one's own pocket. In practical terms, it is also often impossible to attend a private school, since other faith groups are far fewer in number than Roman Catholics and have their private schools only in large cities where there are sufficient students.

5.7 With regard to the claim under article 2 of the Covenant, counsel submits that the authors have claimed a violation of this article together with article 26 of the Covenant. He reiterates his position that the State party has failed to satisfy the legal obligations under article 2 to remove the discrimination. In this context, he underlines that pursuant to article 2 (2) the Covenant contemplates that "constitutional processes" may be undertaken in order to give effect to the rights recognized in the Covenant and in remedying the violation in question.

5.8 Counsel contests the State party's argument that the differentiation in treatment between Roman Catholic schools and other denominational schools is based on reasonable and objective grounds. He reiterates that the current demographic and ethno-cultural makeup of Ontario does not support the discriminatory treatment of all other religious denominations, save and except the Roman Catholic denomination. What may have been a reasonable and objective ground in 1867 is no longer applicable in current society.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party has challenged the admissibility of the communication on the basis that the authors cannot claim to be victims of a violation of the Covenant. In this context, the Committee notes that the authors while claiming to be victims of discrimination, do not seek publicly funded religious schools for their children, but on the contrary seek the removal of the

public funding to Roman Catholic separate schools. Thus, if this were to happen, the authors' personal situation in respect of funding for religious education would not be improved. The authors have not sufficiently substantiated how the public funding given to the Roman Catholic separate schools at present causes them any disadvantage or affects them adversely. In the circumstances, the Committee considers that they cannot claim to be victims of the alleged discrimination, within the meaning of article 1 of the Optional Protocol.

7. Accordingly, the Human Rights Committee decides:

(a) that the communication is inadmissible under article 1 of the Optional Protocol;

(b) that this decision shall be communicated to the State party, the authors and their counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion of Committee members P. Bhagwati, E. Evatt, L. Henkin and C. Medina Quiroga (dissenting)

I am unable to agree with the view of the Committee that this case is inadmissible. The situation is that the Province of Ontario provides a benefit to the Catholic community by incorporating their religious schools into the public school system and funding them in full. This benefit is discriminatory in nature as it prefers one group in the community on the ground of religion. Those whose religious schools are not funded in this way are clearly victims of this discrimination (as in the Waldman case).

But that does not exhaust the scope of those who may claim to be victims. Parents who desire religious education for their children and are not provided with it within the school system and who have to meet the cost of such education themselves may also be considered as victims. The applicants in this case include such persons, and the claims of at least those persons should, in my view, be considered admissible.

(Signed) P. Bhagwati

(Signed) E. Evatt

(Signed) L. Henkin

(Signed) C. Medina Quiroga

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

H. Communication No. 824/1998, Nicolov v. Bulgaria
(Decision adopted on 24 March 2000, sixty-eighth session)*

Submitted by:	Mr. N. M. Nicolov
Alleged victim:	The author
State party:	Bulgaria
Date of communication:	14 January 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 March 2000,

Adopts the following:

Decision on admissibility

1 The author of the communication is Nicolai Milanov Nicolov, a citizen of Bulgaria. He claims to be a victim of violations by Bulgaria of articles 14, paragraph 1, 25 (c) and 26 of the International Covenant on Civil and Political Rights. The International Covenant on Civil and Political Rights and the Optional Protocol thereto entered into force for Bulgaria respectively on 23 March 1976 and 26 March 1992.

The facts as submitted by the author

2.1 In March 1990, the author was appointed as District attorney in the town of Zlatograd in Bulgaria. In November 1992, following a decision by the High Judicial Council,[1] he was reassigned as District attorney in the town of Sliven. The author held this position until 10 November 1993 when, by decision of the High Judicial Council, he was transferred to what he denotes as "a minor position" ("an ordinary attorney") in the Regional attorney's office in Sliven. In November 1993, he claims that "mafia-connected" officials of the Head Attorney's Office of Bulgaria, and of the subordinate Regional Attorney's Office of Sliven, initiated an invasion of his office where all his personal and official documentation was removed. From this point onwards, he was neither allowed to enter his office nor to practice as an attorney.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipolito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.2 It is further submitted that on 8 February 1995, by decision of the High Judicial Council, he was dismissed from his position in the civil service. The decision was based on article 131, paragraph 1 and 4, of Law on the Judiciary and article 129(3) of the Bulgarian Constitution which, inter alia, allows dismissal of prosecutors with more than three years in the service on the grounds of a "lasting actual disability to perform his functions over more than one year".

2.3 After the High Judicial Council's decision, the author petitioned the High Judicial Council to issue a ruling in accordance with article 120 of the Constitution of Bulgaria, which would give the author the right to function in his position as district attorney until the case had been reviewed by the Supreme Court. On 22 February 1995, the High Judicial Council refused to issue such a ruling.

2.4 According to article 120 of the Constitution, the decisions of administrative bodies can be brought before the courts for judicial review. The author lodged such an appeal against the decisions of the High Judicial Council to the Supreme Court, basing it on several grounds. He argued, inter alia, that

- there was no legal basis for the dismissal,
- several members of the High Judicial Council were partial as they were on bad terms with him because he did not agree to act in violation of his official duties and to service the interests of the Mafia group which has had a hold on the members of the High Judicial Council since 1992, and that it was only due to the votes of these members that the required majority for his dismissal was ensured,
- the two lawyers he had assigned to represent him were not allowed to take part in the hearings, in violation of his right to representation under the Bulgarian Constitution.

2.5 On 15 October 1996, the five-member Supreme Court dismissed the author's appeal. The author states that there is no other authority in Bulgaria to which the Supreme Court's judgement can be appealed.

The complaint

3.1 The author alleges that article 14, paragraph 1, was violated in the proceedings before the Supreme Court on the grounds that the Court was not an "independent and impartial tribunal" and that it did not ensure equality of the parties. The author submits that the five-member Supreme Court that tried the case "was completely dependent on the other litigant". He submits that under article 129 of the Constitution and the Law on the Judiciary, all judges of the Supreme Court are "appointed, promoted, reduced in rank, moved and dismissed by the High Judicial Council", and that the Chairperson of the Supreme Court, under the same regulations, is a member of the High Judicial Council. The author states that it is obvious that the Justices who tried his case were dependent on the High Judicial Council as far as their careers were concerned, "i.e. if any of them had not fulfilled the will of the majority of the High Judicial

Council he would have risked to be dismissed, moved, reduced in rank or at least penalised on invented or insinuated grounds. It is well known that there is not a Supreme Court judge who would risk a conflict with the High Judicial Council, giving a legal and impartial judgement on a case."

3.2 With regard to the Court's alleged failure to ensure equality of the parties, the author makes reference to the Court's assessment of his case. It is submitted that the Court, due to its partiality, violated both municipal and international law. It is alleged that article 129, paragraph 3 of the Constitution (as cited supra), on which the dismissal was based, requires that one has had a lasting actual disability of more than one year. The author states that he has never been ill for more than one year, and that his accumulated sick leave was 337 days in the period the High Judicial Council based its decision on, i.e. less than one year. He further claims that in the Supreme Court's judgement it is wrongfully stated that it had been ascertained through the proper channels that he had been unable to perform his duties for more than a year. According to the author, this was never ascertained by a competent, medical authority.

3.3 The author alleges a violation of his right to have access, on general terms of equality, to public service in his country, as provided for in article 25(c) of the Covenant. The author submits that since he did not agree to act in violation of his official duties in order to serve the above-mentioned "mafia group", he became subject to a series of repressive measures aiming to illegally dismiss him from his previous job and to deny him access to the civil service for the future. Reference is made to the actions, as described above, of the High Judicial Council and the Supreme Court. Furthermore, the author submits that after the Supreme Court's judgement the series of repressive measures from officials of the judiciary in Bulgaria went on not only with the aim to prevent him from becoming a civil servant again, but also by an attempt to have him disbarred and attempts at his physical liquidation. These alleged attempts are not specified.

3.4 Finally, the author alleges a violation of article 26 of the Covenant, on the ground that he was discriminated against because of his political and moral convictions. It is submitted that he was dismissed as a civil servant because he only served the Bulgarian State and the Bulgarian people, and refused to serve the interests of certain "mafia groups".

Submissions by the parties

4.1 In its submission of 13 November 1998, the State party challenges the admissibility of the communication. The State party submits that the communication is inadmissible both under article 3 as an abuse of the right to submission and under article 5, paragraph 2 (a), of the Optional Protocol as the same complaint has been filed with the European Commission on Human Rights. With regard to the author's claims under article 14 it is further submitted that they are incompatible with the Covenant, and that the claim is inadmissib'e under article 3 of the Optional Protocol for that reason.

4.2 Under the claim that the communication is an abuse of the right to submission, the State party submits that the author has availed himself of "insulting and offensive language ... as regards higher constitutional bodies and officials in the judiciary." The communication is said to

be "full of libellous allegations with respect to the High Judicial Council, the Main Prosecutor's Office and higher magistrates, and in particular as regards the Chairman of the Supreme Administrative Court, Mr. Vladislav Slavov and the Chairman of the Supreme Court of Cassation, Mr. Rumen Yanev."

4.3 With particular regard to the author's claim under article 25, the State party submits that the facts clearly show that the author has held positions as a district prosecutor in two different towns and as a prosecutor in the Regional Prosecutor's Office. Consequently, it is stated, "no discrimination in the meaning of article 25(c) of ICCPR has been exerted". With particular regard to the author's claim under article 26, the State party submits that the communication lacks "any proof for an alleged violation by Bulgaria ... The dismissal procedure applied in Mr. Nicolov's case is fully in compliance with the provisions of the 1991 Constitution and the Law on the Judiciary. The facts of the case suggest that the applicant was treated equally before the law and was entitled to equal protection of the law without discrimination on any ground ... The decision of the High Judicial Council, as well as the decision of the Supreme Court of the Republic of Bulgaria have also ruled in that sense. Consequently, it should be considered that the applicant has invoked non-existing violations."

4.4 As mentioned, the State party also invokes article 5, paragraph 2(a), and submits that on 7 November 1996 an identical complaint by the same author was filed against Bulgaria before the European Commission of Human Rights in Strasbourg, registered there as application No. 35222/97. According to the State party, on 26 May 1997 the case was considered incompatible ratione materiae with the provisions of the Convention and, accordingly, declared inadmissible under article 27, paragraph 2, of the European Convention.

4.5 With regard to the author's claim under article 14, the State party submits that article 14, paragraph 1, of the Covenant "has no application with respect to cases which refer to the discretionary powers of the public or judicial authorities." Since the judiciary under the 1991 Constitution is an independent power of state, legal disputes related to e.g. promotion or dismissal of judges, prosecutors and investigating magistrates is strictly governed by the Constitution and the Law on the Judiciary. Due to the "public nature of the dispute which refers to a position (service) within the judicial system", it is submitted that such disputes fall outside the scope of article 14, paragraph 1, of the Covenant. Consequently, the claim should be held inadmissible under article 3 of the Optional Protocol.

5.1 In his comments, the author argues for the admissibility of the communication. He submits that the communication is not an abuse of the right of submission. He reiterates that the real reason for his dismissal was his reluctance to serve the Mafia and that the dismissal was without legal basis, as he had not been unable to perform his duties for more than a year. In this regard, he argues that the High Judicial Council and the Supreme Court committed errors in law by calculating his sick leave from the first day he was ill until the last, without taking into account that there had been days in between on which he had been at work. He reiterates that his accumulated sick leave was 337 days, and, in any event, that the period which the authorities had based their decision was less than a year, as it only ran from 8 November 1993 until 5 November 1994.

5.2 The author further contests that he was "treated equally before the law". Again, he claims that he "was the subject of different repressions and discriminations", including being denied the constitutional right to a lawyer defending him before the High Judicial Council.

5.3 With regard to the alleged violation of article 14, the author argues that the State party must have misunderstood his claim when holding that the facts show that the author has held positions as a prosecutor, and that consequently there can have occurred no violation of article 25. The author explains that he does not deny having held these positions, but that his claim was based on that the dismissal in 1995 deprived him of equal access to public service.

5.4 Finally, the author contests both that the communication falls outside the scope of article 14 and that it is inadmissible because a similar complaint was lodged to the European Commission on Human Rights. With regard to the latter, the author argues that the European Convention on Human Rights does not include provisions similar to those contained in articles 25 and 26 of the International Covenant on Civil and Political Rights.

6.1 In its submission of 14 February 1999, the State party submits that the High Judicial Council's decision to dismiss the author, as affirmed by the Supreme Court, did not violate any of the author's Covenant rights. The State party submits that the proposal as well as the subsequent dismissal was based solely on article 129, paragraph 3, of the Constitution which exhaustively stipulates the criteria for the dismissal of prosecutors:

> "Justices, prosecutors and investigating magistrates ... shall be dismissed only upon retirement, resignation, upon the enforcement of a prison sentence for a deliberate crime or upon lasting disability to perform their functions over more than a year."

6.2 According to the State party, this provision, correctly interpreted, is applicable to the author's case. Furthermore, it is submitted that the decision of the High Judicial Council was taken with the quorum required by law and by secret ballot in compliance with established procedure. In conclusion, the State party asserts that this was the sole basis for the decision and that the author's "political and moral convictions" did not play any role, nor is there any basis for the unsubstantiated claim that the author was "on bad terms" with several members of the council and that this had influenced the decision.

6.3 The State party further notes the author's claim that article 14, paragraph 1, of the Covenant was violated in the proceedings before the Supreme Court on the grounds that the Court was not a "competent, independent and impartial tribunal. The State party submits that, contrary to the allegations of the author, the Court was an independent and impartial tribunal and the equality of the parties was ensured in the proceedings.

6.4 It is pointed out that the five-member Supreme Court met six times in order to decide the case. The State party states that the Court requested and considered all the evidence submitted by the author; it satisfied all the demands of the author, including allowing corrections in the minutes of the sessions; at all times the author and his legal counsel, Mr. Nikola Tsonkov, were present and participated actively in the proceedings.

6.5 The State party submits that the author's allegation that the Court had rendered its Judgment in conditions of complete dependence on the other litigant (i.e. the High Judicial Council) is baseless, as the Court is not hierarchically or in any other way dependent on the High Judicial Council. On the contrary, the Court exercises judicial control over the decisions of the High Judicial Council. There are numerous cases in the case-law of the Court where it rescinded decisions of the High Judicial Council on grounds of their non-conformity with the law, including one in 1996 following an appeal by the same author in a different administrative case.

6.6 It is stated that in performing their functions, the judges are independent, as is also guaranteed by article 117 of the Constitution of the Republic of Bulgaria. Furthermore, the State party argues that the five judges in question, having served for more than three years in office, are unsubstitutable according to Article 129, paragraph 3 of the Constitution, which gives additional guarantees for their independence.

6.7 Furthermore, the State party notes that, according to the law, the author had the right to request the withdrawal of judges for whom there were grounds to believe that they would not be impartial. As evident from the minutes, at no time did the author or his legal counsel make such a request.

6.8 With regard to the alleged violation of article 25 (c), the State party submits that the dismissal was completely lawful, based on objective and reasonable criteria, and therefore in full compliance with article 25. The State party also points out that his dismissal from his previous position does not in any way preclude his right to be appointed to another position in the Bulgarian judicial system or in the civil service in general.

6.9 The State party further submits that the communication lacks any substantiation of the alleged violations of article 26. Again, the State party argues that the dismissal procedure was in full compliance with domestic law, and that the author was treated without any discrimination of any kind.

6.10 In conclusion, the State party submits that there are no grounds on which to accept the author's claims that he has been persecuted because of his moral and political convictions.

7.1 In his submission of June 1999, the author challenges the State party's submission and reiterates that his rights under articles 14, 25 and 26 were violated.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The State party has submitted that the Committee is barred from considering the present communication under article 5, paragraph 2(a), of the Optional Protocol as an identical complaint has been filed with the European Commission on Human Rights. The Committee notes, however, that it is only where the same matter is being examined under another procedure

of international investigation or settlement that the Committee lacks competence to deal with a communication under article 5, paragraph 2 (a), of the Optional Protocol. The State party itself has stated that the European Commission on 26 May 1997 declared the author's application inadmissible, and article 5, paragraph 2(a), therefore does not prevent the Committee from considering the present communication.

8.3 The Committee notes that the author has claimed that his rights under article 14 were violated as the members of the High Judicial Council were biased against him and that the Supreme Court was not an independent tribunal. The author has not, however, substantiated these claims and the Committee finds that all claims under article 14 are inadmissible under article 2 of the Optional Protocol.

8.4 Similarly, with regard to the alleged violations of articles 25 and 26 of the Covenant, the Committee notes the State party's explanation and finds that also these claims are inadmissible for lack of substantiation under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The High Judicial Council is an administrative body which structure and functions are determined by articles 129-133 of the Constitution of the Republic of Bulgaria and by articles 16-34 of the Law on the Judiciary. Under article 129 of the Constitution, the High Judicial Council has the power to elect, promote, demote, reassign and dismiss justices, prosecutors and investigating magistrates. According to article 130, the membership of the High Judicial Council is limited to 25, three of whom are ex officio members. Of the remaining 22 members, half are elected by the national assembly and half by the judicial branch, all for terms of 5 years. According to the State party, "their impartiality is guaranteed by the method of election and the requirements for holding office."

I. Communication No. 861/1999, Lestourneaud v. France (Decision adopted on 3 November 1999, sixty-seventh session)*

Submitted by:	Mr. Alain Lestourneaud
Alleged victim:	The author
State party:	France
Date of the communication:	16 September 1997 (initial communication)

The Human Rights Committee, established under article 28 of the International covenant on Civil and Political Rights,

Meeting on 3 November 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Alain Lestourneaud, a French citizen born on 23 September 1952. He claims to be a victim of a violation by the French Republic of articles 2 and 26 of the International Covenant on Civil and Political Rights.

The facts as submitted

2.1 On 23 March 1995, the author, as a member of the Bar of Thonon-les-Bains, was appointed, within the framework of legal aid, to defend the interests of a minor in a matter before the Assize Court of Haute Savoie. The minor was the civil claimant in a criminal case involving rape and other sexual abuse.

2.2 After proceedings that lasted for more than two years, the accused in the case was found guilty and sentenced to seven years' imprisonment. The case having been finalized, the author

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Under rule 85 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the examination of the communication.

and the lawyer of the defendant applied for payment of the legal aid fee. The said fee is calculated in accordance with a schedule reproduced in article 90 of the Decree of 19 December 1991 concerning legal aid.

2.3 According to the schedule regulating the fees of lawyers acting within the context of legal aid, the plaintiff's lawyer is remunerated on the basis of eight credits for representation at the examination stage and 24 credits for representation before the Assizes Court. The defendant's lawyer, on the other hand, is remunerated at the rate of 50 credits in the first case and 40 credits in the second case. The currently applicable credit is equivalent to FF 136.

2.4 Consequently, in his capacity as the claimant's lawyer, the author received a fee amounting to 32 credits at the end of the proceedings, while the defendant's lawyer received a fee of 90 credits.

The complaint

3.1 The author claims that this disparity constitutes discrimination on the basis of the position in the criminal trial. The author submits that the time spent by each lawyer at the hearings is exactly the same and that the difference in remuneration therefore constitutes a violation of article 26 of the Covenant.

3.2 Moreover, the Legal Aid Act excludes any possibility of an effective remedy insofar as the alleged violation cannot be effectively brought before a judicial authority for redress. The author contends that this constitutes a violation of article 2(3) of the Covenant. For the same reason, the author was unable to exhaust domestic remedies.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee notes that the author's claim is based upon the difference in remuneration between legal aid services performed by counsel for the civil claimant and those performed by counsel for the defendant. The Committee recalls that differences in treatment do not constitute discrimination, when they are based on objective and reasonable criteria. In the present case, the Committee considers that representation of a person presenting a civil claim in a criminal case cannot be equalled to representing the accused. The arguments advanced by the author and the material he provided do not substantiate, for purposes of admissibility, the author's claim that he is a victim of discrimination.

4.3 With regard to the author's claim under article 2(3) of the Covenant, the Committee recalls that, for purposes of the Optional Protocol, article 2 can only be invoked in relation with any of the articles contained in part III of the Covenant. The author's claim under article 26 being inadmissible, as a consequence his claim under article 2 is likewise inadmissible.

5. Accordingly, the Human Rights Committee decides:

(a) that the communication is inadmissible under article 2 of the Optional Protocol;

(b) that this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

J. Communication No. 871/1999, Timmerman v. The Netherlands (Decision adopted on 29 October 1999, sixty-seventh session)*

Submitted by:	Ms. Joukje E. Timmerman
Alleged victim:	The author
State party:	The Netherlands
Date of the communication:	22 September 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 October 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Ms. Joukje Elisabeth Timmerman, a Dutch citizen born on 8 April 1951, currently residing in Groningen, the Netherlands. She claims to be a victim of a violation by the Netherlands of the articles 7, 8, 9 paragraphs 1 and 2, 17 and 26 of the Covenant.

The facts as submitted by the author

2.1 The author began work on a temporary basis as a surgery assistant at the Academic Hospital of Groningen (Academisch Ziekenhuis Groningen - AZG) on 1 December 1980. On 1 December 1981 she was offered a permanent appointment.[1] At a certain point in time she factually carried out the activities of a first responsible surgery assistant in the Department of Plastic Surgery.

2.2 In 1989, the hospital's Surgery Department was reorganised and an "Operation Centre" was created. Surgery assistants were supposed to be flexible and able to perform surgery tasks in different Surgery Departments; there was a so-called "circulation duty". The author was offered

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

the function of surgery assistant on 1 September 1989, starting in September 1990. She accepted the position on the condition that her salary scale would be raised, a request she had already submitted in January 1988. She had made this request, because she felt that her additional coordinating activities at that moment entitled her to the higher salary scale.

2.3 At first, the AZG refused to reconsider the author's salary scale, but after a Court order (Ambtenarengerecht) of 15 February 1991 it raised the author's salary scale from B07 to B08, and awarded a one-time payment of 2,500 guilders. This was made known by the AZG to the author by letter of 10 July 1991.

2.4 The author had fallen ill from the date she was supposed to start her new function (September 1990), and she did not appear at work. Eventually, the AZG was informed by a physician that the author could gradually return to her normal work. When the author returned to work, she was still not satisfied with her salary scale, the function name, the circulation duty and the specific tasks she was requested to perform. Several talks between the author and the responsible persons of the Centre took place, but the author only wanted a reconsideration of her salary scale, function name and circulation duty.

2.5 After a few letters of reminder to the AZG with this request of reconsideration, the author set a time limit of two weeks for a response. When the AZG did not respond within the time set by the author, she submitted her case on 14 January 1992 to the District Court of Groningen (Arrondissementsrechtbank Groningen), relying on the failure of the AZG to respond to her request. This Court ruled on 3 February 1995 that the time period of two weeks (set by the author) was too short, and that the AZG had in fact reacted within reasonable time. The AZG responded that it would maintain its previous position, as worded in the letter of 10 July 1991.

2.6 On 28 April 1993 the author had received a letter of dismissal from the AZG, which she also contested in the above-mentioned case. However, the Court ruled that this dismissal by the AZG was lawful. The author appealed the decision to the Central Board of Appeal (Centrale Raad van Beroep). The Board, the last judicial resort, confirmed the ruling of the District Court.

2.7 The author complained to the European Commission on Human Rights. On 4 July 1997, the Commission rejected her application as inadmissible.

The complaint

3. The author claims: 1) that there was "unequal remuneration and unequal treatment in respect of work of equal value", which allegedly constitutes a violation of article 26 of the Covenant; 2) that the policy of "circulation duty' was discriminatory, because it was only applied to her; 3) that the means employed by the AZG to "deteriorate the author's legal status as an employee of the AZG, i.e. fraud, forgery, blackmail and threat, constitute a violation of article 17"; 4) a violation of articles 8 and 9, because when she returned to the AZG after her illness, she was required to work in conditions that amounted to forced labour and a deprivation of her liberty; 5) that the policy of the AZG was applied to "get rid of the her", and ultimately constituted a form of torture, a violation of article 7 of the Covenant.

Issues and proceedings before the Human Rights Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee has noted the author's claim that she is a victim of a violation of articles 7, 8, 9 and 17 of the Covenant. The Committee considers, however, that the arguments advanced by the author relating to the conduct of the AZG do not substantiate, for the purposes of admissibility, that the alleged actions by the AZG would amount to a violation of the said articles of the Covenant. Therefore, this part of the communication is inadmissible under article 2 of the Optional Protocol.

4.3 In relation to the author's claim that she was a victim of discrimination in violation of article 26 of the Covenant, as, inter alia, there was unequal pay for equal work and the circulation duty was only applied to her and not to other employees in a similar situation, the Committee notes that the arguments of discrimination were never raised before the domestic courts. The Committee therefore decides that this claim is inadmissible for non-exhaustion of domestic remedies. Accordingly, this claim is inadmissible under article 5 (2) (b) of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under articles 2 and 5(2)(b) of the Optional Protocol;

(b) that this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] This means that she became a civil servant according to Dutch law.

K. Communication No. 873/1999, Hoelen v. The Netherlands (Decision adopted on 3 November 1999, sixty-seventh session)*

Submitted by:	Mr. Thomas Peter Hoelen (represented by Mr. E. T. Hummels)
Alleged victim:	The author
State party:	The Netherlands
Date of the communication:	23 May 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Thomas Peter Hoelen, a Dutch citizen, born on 11 October 1970. He claims to be a victim of a violation of articles 14 and 26 of the Covenant. He is represented by Mr. E.Th. Hummels.

The facts as submitted

2. On 8 May 1993, the author participated in a demonstration which ended in violent disturbances. On 8 June 1993, the author was found guilty by a single judge of the District Court at The Hague for having committed acts of violence against police personnel by throwing stones. He was sentenced to a fine of NGL 750 and a suspended sentence of two weeks' imprisonment. His appeal was heard on 13 October 1994, 9 and 10 February 1995, and rejected by the Court of Appeal on 24 February 1995. His further (cassation) appeal was rejected on 20 February 1996.

The complaint

3.1 The author claims that his right to equality under article 26 of the Covenant has been violated, because no police officers were prosecuted after the disturbances, although independent reports had established that the police had used unreasonable violence.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

3.2 The author further claims that the delay between his conviction and the hearing of the appeal was unduly long, amounting to a violation of article 14. He states that his was a simple case and that a delay of over a year was thus inadmissible.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee recalls that the prosecution of one person and the failure to prosecute another as such does not raise an issue of equality before the law, since each case has to be judged on its own merits.[1] The author's allegations and the material before the Committee do not substantiate the author's claim that he is a victim of a violation of article 26 in this respect.

4.3 With regard to the delay between conviction and the hearing of his appeal, the Committee considers that the material before it does not substantiate the author's claim that the delay of 14 months constituted a violation of his right to be tried without undue delay, taking into account also the nature of his sentence and the fact that the author had not been detained. This claim is therefore inadmissible under article 2 of the Optional Protocol.

5. Accordingly, the Human Rights Committee decides:

(a) that the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) that this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] See the Committee's decision declaring inadmissible communication No. 579/1994 (Werenbeck v. Australia), 27 March 1997, CPR/C/59/D/579/1994, para. 9.9.

L. Communication No. 882/1999, Bech v. Norway (Decision adopted on 15 March 2000, sixty-eighth session)*

Submitted by:	Mr. Chris Bech (represented by Mr. Knut Rognlien from Oslo)
Alleged victim:	The author
State party:	Norway
Date of the communication:	28 September 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 March 2000,

Adopts the following:

Decision on admissibility

1. The author of the communication is Chris Bech, a Norwegian citizen, born on 23 May 1956. He claims to be a victim of a violation by Norway of article 14 of the International Covenant on Civil and Political Rights. He is represented by Mr. Knut Rognlien, a lawyer in Oslo.

The facts as presented

2.1 On 9 November 1995, the Oslo City Court found the author guilty of fraud and sentenced him to five years' imprisonment. The author appealed the judgement to the Borgarting High Court. A hearing was held from 15 January to 6 February 1997. Prior to the hearing, on 23 December 1996, the author was involved in a car accident. His injury caused him severe neck pains and thus difficulty in sleeping, which led to difficulties in concentration and disturbances of vision. He was prescribed medication for pain relief, which had a soporific effect. The doctors told him to take rest and have as little stress as possible.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.2 Due to the author's state of health, the defence requested that the hearing of the appeal be postponed. On the first day of the hearing, on 15 January 1997, after consulting with the specialist treating the author as well as with his general practitioner, the Court rejected the request. It decided, however, that the hearings would be of shorter duration than usual, and that short breaks would be permitted at hourly intervals, and that an armchair would be made available to the author.

2.3 It appears from a statement made by the author's specialist, that she told the Court that the author suffered pain which could be relieved with medication, and that he would be able to go through with the appeal if he were allowed regular breaks.

2.4 The next day, the author's condition deteriorated and on 17 January 1997, the Court decided to interrupt his testimony due to his condition. It was agreed that the author would see a doctor and do a blood test. The opinion by the National Institute of Forensic Toxicology of 21 January 1997 was that the blood test showed that it was likely that the author was influenced by the medication. On 23 January 1997, the author did not attend court and the hearing was postponed by one day. After that, the hearing resumed with the author present. On 27 February 1997, the Court rejected the author's appeal and sentenced him to five years' imprisonment.

2.5 On 19 March 1997, the author appealed the judgement on procedural grounds. The Appeals Committee of the Supreme Court decided not to hear the appeal. A second request for review was rejected on 14 May 1997. After having obtained an expert witness statement from a doctor at the National Institute of Forensic Toxicology on 5 June 1997, the author's lawyer again requested the Supreme Court to hear the appeal. In the statement, the doctor said that the medication the author was taking could have a calming, relaxing and stupor-inducing effect, and that it could adversely affect memory function, learning ability and concentration. The effects were said to be comparable to 0.1 per cent alcohol. On 30 September 1997, the Appeal Committee of the Supreme Court rejected the author's appeal.

The complaint

3. The author claims that he did not receive a fair hearing on appeal, because he was not in a position to give an adequate and comprehensive explanation of his case, nor could he follow the testimony of other witnesses. As a consequence, his defence was impaired and he could not instruct his counsel properly. In this context, counsel points out that the case was complicated, with an indictment of over 15 pages, covering the author's business, financial plans and income. The author's testimony was central to his defence. Furthermore, the author claims that he was unable to prepare his defence properly, because he was not in a position to read the hundreds of documents placed before the Court.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The author's allegation of unfair trial is based on his claim that his medical condition impaired his functioning in such a way as to impede the presentation of his appeal. The Committee notes that this claim was brought before the Courts, both at the time of the hearing and on appeal to the Supreme Court, and that the Courts rejected the author's claim after having heard medical expert testimony. The Committee recalls that it is generally not for the Committee but for the Courts of States parties to evaluate the facts and evidence in a specific case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. The arguments advanced by the author and the material he provided do not substantiate, for purposes of admissibility, his claim that the Court's evaluation of his medical condition was arbitrary or amounted to a denial of justice. Accordingly, the communication is inadmissible under article 2 of the Optional Protocol.

5. Accordingly, the Human Rights Committee decides:

(a) that the communication is inadmissible under article 2 of the Optional Protocol;

(b) that this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

M. Communication No. 883/1999, Mansur v. The Netherlands
(Decision adopted on 5 November 1999, sixty-seventh session)*

Submitted by:	Messrs. L. E. and J. Mansur (represented by Dr. Jan M. Sjocrona and Mr. John H. van der Kuyp)
Alleged victim:	The authors
State party:	The Netherlands
Date of the communication:	12 October 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 5 November 1999,

Adopts the following

Decision on admissibility

1. The authors of the communication are Luis Emilio Mansur and Jossy Mehsen Mansur, Dutch citizens who are residents of Aruba. They claim to be victims of violations by the Kingdom of the Netherlands of their rights under articles 2 and 17 of the International Covenant on Civil and Political Rights. The victims are represented by Dr. Jan M. Sjöcrona of The Hague, the Netherlands and Mr. John H. van der Kuyp of Oranjestad, Aruba.

The facts as submitted by the authors

2.1 The authors are members of the business community in Aruba. Among other enterprises Luis Emilio Mansur is co-owner of a shipping company and Jossy Mehren Mansur is owner and editor-in-chief of a newspaper and co-owner of a trading company.

2.2 Under a Royal Decree of 22 October 1994 the Interim Head of Aruban Security Service, A. Koerten, was instructed to carry out an investigation into the security and integrity of Aruba. A report on this investigation was produced on 20 April 1995, entitled Security and Integrity of Aruba: Context and Perspective.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 The report was issued as top secret and was sent to a limited number of state officials and institutions, named in the report.

2.4 The report draws a picture of security in Aruba and mentions that foreign services fighting crime in the region are "almost unanimous in their opinion that the predominant image of the Aruban business community is one of joint services towards (laundering specialists of) regional drug cartels." The report mentions the authors by name and portrays them as criminals who were associated with criminal organizations involved in drugs trafficking, gun trafficking and laundering money obtained from criminal activities.

2.5 Despite the fact that the report was classified as top secret it was leaked to the press and its contents became public. It is not clear who leaked the report. An investigation of the leak was carried out by the Dutch Internal Security Service in which it was supposedly found that the leaked photocopy was not made from a copy in the hands of the Minister of Dutch-Antillean and Aruban Affairs or another Dutch official. The investigation report did not state of which copy the photocopy was made.

2.6 The authors claim that the allegations against them in the report are totally false and that as a result of the report becoming public their reputations were severely harmed. This led to serious damage to their business interests. They claim that by allowing the report to become public the State party violated their rights not to be subjected to unlawful attacks on their honour and reputation, protected under article 17 of the Covenant.

2.7 The authors requested the Minister of Dutch-Antillean and Aruban Affairs to disassociate himself from the report. When he refused, they initiated summary proceedings in the court of first instance in Aruba. In these proceedings they requested a declaration that the State party, the Minister of Dutch-Antillean and Aruban Affairs and the Interim Head of the Security Service of Aruba had no evidence that the authors were involved in laundering money or in fraudulent actions.

2.8 The court of first instance ruled that it had no competence to peruse the claim against the State party and that the Official Secrets Act justified refusing a remedy against the Interim Head of Security.

2.9 The authors filed an appeal against the dismissal of their summary action with the Joint Court of Justice of the Dutch Antilles and Aruba. Contrary to the judgment of the lower court this court held that the courts were competent to peruse a claim against the State party. However, the Court held that the authors had failed to demonstrate, nor make probable, that the defendants had been negligent in allowing publication of the report and that they could not be held responsible for acting in violation of article 17 of the Covenant.

2.10 The authors did not challenge the above decision before the Netherlands Supreme Court as they were advised by a Dutch cassation attorney that they had no grounds for a successful cassation appeal.

The author's claims

3.1 The authors claim that by not preventing publication of the information relating to them contained in the secret report the State party has violated their rights under article 17 of the Covenant. They further claim that the directives of the State party regarding classification of secret information and the requirement of the Court in the summary proceedings that the authors prove the negligence of the State party result in a violation of the duty of the State party, under article 2, paragraph 3, of the Covenant, to provide an effective remedy for violation of their rights under article 17.

3.2 The authors claim that by pursuing summary proceedings they have exhausted domestic remedies. They concede, however, that the domestic law does "offer the possibility of a civil standard procedure (before the same instance as where the summary proceedings were lost), yet going through this procedure takes up at least 4 to 6 years (in view of the existing possibilities for appeal and cassation)."

Issues and proceeding before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 From the materials presented by the authors it is clear that within the framework of summary proceedings the domestic courts could not examine the factual allegations of the authors. These could only be examined in a standard civil action. The authors have conceded that they have not commenced a standard civil procedure against the State party for a remedy for the alleged attack on their honour and reputation in violation of article 17 of the Covenant. In the circumstances, the Committee cannot accept the mere assertion by the authors that the application of domestic remedies will be unreasonably prolonged. Accordingly, the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol;

(b) that this decision shall be communicated to the authors and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

N. Communication No. 891/1999, Tamihere v. New Zealand
(Decision adopted on 15 March 2000, sixty-eighth session)*

Submitted by:	Mr. David Wayne Tamihere
Alleged victim:	The author
State party:	New Zealand
Date of the communication:	20 November 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 March 2000,

Adopts the following:

Decision on admissibility

1. The author of the communication is David Wayne Tamihere, a New Zealand citizen, born in 1953. He claims to be a victim of the violation of his rights under articles 2, 14 and 26 of the International Covenant for Civil and Political Rights by New Zealand.

Facts as submitted by the author

2.1 In April 1989, two Swedish tourists were murdered and their possessions were stolen in New Zealand. After an intense police investigation and much public and media interest, the author became the prime suspect. While the author confessed to the theft of the victims' car, he has continuously maintained his innocence as regards the murder. The author's trial before a jury commenced in October 1990, and in December 1990, the jury convicted the author of murder and theft.

2.2 The author appealed the trial court's decision. The hearing of the appeal was set for 21 August 1991 and the author was assigned legal aid for senior and junior counsel, who had represented him at trial, to argue the appeal. Shortly before the hearing, senior counsel requested the author to sign a letter accepting that there were no grounds on which to base his appeal. When the author refused to sign the letter, senior counsel advised the author that he

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

would withdraw from the proceedings. The Court of Appeal initially rejected the author's request for legal aid to finance new counsel to argue the appeal, although it left the matter open so as to allow the author to present grounds to show why he should be granted such legal aid. Before the appeal was heard, new evidence was discovered and the Court of Appeal revised its previous decision and assigned legal aid to the author for a lawyer and a pathologist. The new lawyer argued the appeal before the court in May 1992.

2.3 In its May 1992 decision, the Court of Appeal rejected the appeal, and found that the author had not been a victim of a miscarriage of justice pursuant to Section 385(c) of the New Zealand Crimes Act, 1961. In 1994 the author was denied leave to appeal to the Privy Council.

2.4 In 1996, it was made public that one of the three prison informers who had given evidence against the author had retracted his evidence. In response to this, and upon the author's request, a Member of Parliament requested a ministerial inquiry into the case. The file was transferred to the independent Police Complaints Authority, which conducted an inquiry. After the inquiry was opened the said informer retracted his retraction. Nevertheless, the Police Complaints conducted a thorough inquiry the conclusion of which was that the police had not been guilty of any wrongdoing. As a result, the Minister of Justice rejected a call for further inquiry into the case. The author sent letters to members of several national political parties, but these were received with only lukewarm or minimal interest. The author claims that he has exhausted all domestic remedies.

The complaint

3.1 The author contends that his rights pursuant to articles 2, 14, and 26 of the Covenant have been violated. More specifically he makes the following claims:

(a) that there were three "secret" witnesses whose testimonies were crucial to the Crown's case. These witnesses had been fellow prisoners who, operating as informers for the police, claimed respectively that the author had confessed to the murder on separate occasions;

(b) that his right to fair trial was violated when, in August 1991, the Court of Appeal cancelled the author's access to legal aid, which would have given the author the means to pay for a new lawyer and the prepare for the appeal;

(c) that both the police procedure for obtaining evidence against him and their conduct during the investigation were subject to irregularities, including the manufacturing of evidence that, the author believes, was both perjurious and misleading;

(d) that the courts allowed evidence to be put forward by the prosecution even though some was misleading or its credibility was questionable. As a result, the author claims the courts failed to interpret the facts of the case correctly, which resulted in his wrongful conviction for murder.

Issues and proceedings before the Human Rights Committee

4.1 Before considering any claims contained in the communication, the Human Rights Committee must, in accordance with Article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 As regards the author's claim regarding the evidence of "secret" witnesses, from the materials submitted by the author it transpires that the identity of these witnesses was revealed to the author and his counsel as well as to the jury. The only "secrecy" involved was a "gag order" preventing publication of the witnesses' identity. In these circumstances, the Committee holds that the author has failed to substantiate his claim that his rights under article 14, paragraph 1, were violated in this respect.

4.3 As regards the author's claim that he was denied legal aid for the appeal, the Committee notes that the original decision denying legal aid for the appeal was revised before the date set down for the appeal and that the author was represented by counsel, funded by legal aid, in the Court of Appeal. The author has therefore failed to substantiate his claim that his rights under article 14, paragraph 3 (d) were violated.

4.4 The Committee notes that the documents submitted by the author show that the domestic courts rejected his claims of police irregularities and the lack of credibility of the witnesses who gave evidence on behalf of the prosecution. The Committee refers to its jurisprudence that it cannot review facts and evidence evaluated by domestic courts unless it is manifest that the evaluation was arbitrary or amounted to a denial of justice. The arguments advanced by the author and the material he submitted do not substantiate his claims that the court's decisions suffered from such defects. Accordingly, in respect to the author's claims regarding the police irregularities in gathering the evidence and the credibility of the evidence submitted, the communication is inadmissible under Article 2 of the Optional Protocol.

5. The Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

O. Communication No. 934/2000, G. v. Canada
(Decision adopted on 17 July 2000, sixty-ninth session)*

Submitted by: Ms. G. (Name deleted)

Alleged victim: The author

State party: Canada

Date of the communication: 29 December 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 July 2000,

Adopts the following:

Decision on admissibility

1 The author of the communication is Ms. G, a Canadian citizen, born on 9 May 1949. She claims to be a victim of a violation by Canada of articles 2, 14(1), 17(1) and 26 of the Covenant, because of discrimination relating to the country of origin of her academic credentials.

The facts as submitted

2.1 The author states that she obtained a Ph.D in educational psychology from the University of Toronto in 1976. Since 1983 she has been repeatedly hired for part time temporary teaching by the Department of Psychology of the University of Alberta, but has been systematically excluded from competition for permanent positions, despite the fact that she has published three books and numerous articles in academic journals and that she has excellent appraisals for her teaching.

2.2 In July 1993 the author filed a complaint with the Alberta Human Rights Commission for systemic discrimination. On 28 March 1995, the Commission dismissed the complaint and declined to refer it to a Board of Inquiry for a formal inquiry on the basis that there was no evidence of either specific discrimination or systemic discrimination in the author's case.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. P.N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, and Mr. Abdallah Zakhia.

On 5 July 1996, the Court of Queen's Bench denied the application for judicial review and held that the Commission had no jurisdiction over the author's complaint since it related to a ground not specifically listed under the Alberta Human Rights legislation. Since the parties failed to come to an agreement on costs, the Court by decision of 3 February 1997, ordered the author to pay costs.

2.3 On appeal, the Court of Appeal held that systemic discrimination, if established, is merely part of the bundle of evidence that may prove adverse impact upon the complainant. After having revisited the evidence that was put before the Commission, the Court of Appeal decided that the evidence was not sufficient to warrant the case to be directed to a Board of Inquiry. The Court of Appeal therefore expressed no opinion regarding the jurisdictional questions that were raised and dismissed the appeal.

2.4 The author states that she did not appeal to the Supreme Court because that remedy was not in practice available to her because of her lack of financial means. She also states that the outcome of the case, if she would win, would be that the case would be referred back for consideration to the Alberta Human Rights Tribunal, whose members are employees of the Alberta Human Rights Commission. Moreover, such a procedure would be seriously prolonged in time.

The complaint

3.1 The author claims that she has been discriminated against on the basis of the origin of her degree, because Canadian universities, including the University of Alberta, prefer to hire academics with a degree from a university in the USA. The author argues that discrimination on origin of credentials as a rule excludes groups on the basis of their place of origin, as most people will receive training there. She claims that the country origin of educational credentials is a personal characteristic for which discrimination is prohibited.

3.2 The author further complains about unequal treatment by the Alberta Human Rights Commission, the Court and the Appeal Court in relation to her complaint. In this context, she states that there was sufficient prima facie evidence of systemic discrimination, yet the Human Rights Commission refused to refer her case to a Board of Inquiry for investigation. She further complains that the Commission restated her case, and changed it from a systemic discrimination complaint to one of individual adverse impact discrimination. She also complains that the Court of Queen's Bench in refusing her application for judicial review denied her the opportunity to have her case adjudicated. She also challenges the Court's decision to award costs to the University, because the case was a case of review against a decision of the Alberta Human Rights Commission and not against the University (whose decisions are not subject to judicial review under Canadian law). As to the hearing of her complaint by the Alberta Court of Appeal, the author states that the Court met twice with differently constituted panels, and that at the first hearing agreement was reached that her complaint was within the jurisdiction of the Human Rights Commission. However, according to the author, this panel was dissolved without reason given and after a new hearing by the second panel the Court dismissed the appeal. She also claims that the Court of Appeal failed to apply the relevant case law and that its interpretation of

the Alberta Human Rights Protection Act was inconsistent with the Canadian Charter. She further claims that the Court of Appeal exceeded its jurisdiction by substituting its own opinion for that of the Commission without first deciding on the jurisdiction of the Commission. The author states that the end result was that she was precluded from any judicial remedy without ever having her systemic discrimination complaint adjudicated.

3.3 The author also claims that the above constitutes defamation of her character and reputation. In this context, she also complains about an allegedly defamatory letter which is kept in her file at the Alberta University, and which the University refuses to remove, unless she signs an agreement to end all litigation.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 With regard to the author's claim under article 26, the Committee notes that the author claims that she has been discriminated against on account of the origin of her academic degree. The Committee notes that the author's claim of discrimination was examined by the Court of Appeal and that the Court found that the evidence was not sufficient to make a finding of discrimination. In the opinion of the Committee, the author has failed to substantiate, for purposes of admissibility, that the Court's finding was manifestly arbitrary or amounted to a denial of justice. It is therefore not for the Committee to re-evaluate the facts in the present case. This part of the communication is therefore inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

4.3 The Committee notes that the author's claims under article 14 of the Covenant relate mainly to the evaluation of facts and evidence as well as to the interpretation of domestic law. The Committee recalls that it is in general for the courts of States parties, and not for the Committee, to evaluate the facts in a particular case and to interpret domestic legislation. The information before the Committee and the arguments advanced by the author do not show that the Courts' evaluation of the facts and their interpretation of the law were manifestly arbitrary or amounted to a denial of justice. This claim is therefore inadmissible under articles 2 and 3 of the Optional Protocol.

4.4 With regard to the author's claim that the Court of Appeal first heard her claim in a different composition, and that the panel was subsequently dissolved, after which a new hearing was held by a different panel, the Committee notes that this is a bare allegation made by the author and that she has not done anything to exhaust domestic remedies in connection with this claim. The claim is therefore inadmissible under article 5(2)(b) of the Optional Protocol.

4.5 The Committee considers that the author has failed to sufficiently substantiate, for purposes of admissibility, that she was a victim of a violation of article 17 of the Covenant. Moreover, it appears that the author has failed to exhaust domestic remedies in connection with this claim. This claim is therefore inadmissible under articles 2 and 5(2)(b) of the Optional Protocol.

5. The Human Rights Committee decides:

(a) that the communication is inadmissible under articles 2, 3 and 5(2)(b) of the Optional Protocol;

(b) that this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

P. Communication No. 936/2000, Gillan v. Canada
(Decision adopted on 17 July 2000, sixty-ninth session)*

Submitted by:	Mr. Terry Gillan (represented by Mr. Vincent Th. Calderhead, legal counsel)
Alleged victim:	The author
State party:	Canada
Date of the communication:	9 December 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 July 2000,

Adopts the following:

Decision on admissibility

1 The author of the communication is Mr. Terry Gillan, a Canadian citizen, born on 18 November 1980. He claims to be a victim of a violation by Canada of article 14 read together with articles 2 and 26 of the Covenant. He is represented by Mr. Vincent Thomas Calderhead, legal counsel in Halifax.

The facts as submitted

2.1 On 22 June 1995, the police arrested the author on an unrelated matter and upon searching him, discovered six unopened bottles of beer in various parts of his clothing. Subsequently, he was charged and tried in the youth court for illegal possession of liquor, contrary to section 78(2) of the Liquor Control Act of Nova Scotia.[1] The evidence led before the

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. P.N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, and Mr. Abdallah Zakhia.

court was not challenged by the defence. The defence challenged, however, the relevant legislative framework within which the prosecution was conducted, which violates the accused's right to be presumed innocent.[2] The Youth Court judge rejected the arguments made by the defence, holding that in light of the evidence before the Court, he need not rely on the evidentiary provisions contained in the impugned legislation, but could convict the author without relying on those sections.

2.2 On 22 January 1998, the Court of Appeal dismissed the author's appeal. It ruled that sections 128 and 130(1) were not relied on by the trial judge and need not have been relied on by him. On 13 August 1998, the Supreme Court of Canada denied leave to appeal. With this, it is submitted that all available domestic remedies have been exhausted.

The complaint

3. Counsel claims that the evidentiary provisions in the Liquor Control Act of Nova Scotia are in violation of article 14(2) of the Covenant. He states that thousands of Nova Scotians are charged each year with illegal possession of liquor under a flawed legislative scheme. Counsel submits that most people charged with offences under the Liquor Control Act are members of disadvantaged groups in Canadian society.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 Counsel bases his communication on the allegation that sections 128 and 130(1) of the Liquor Control Act of Nova Scotia violate the presumption of innocence, and thus article 14(2) of the Covenant. The Committee notes from the information before it, that the author in was convicted on the basis that his guilt had been proven beyond any reasonable doubt. In the present case, the courts did not rely on the sections of the Liquor Control Act that counsel seeks to attack. The Committee concludes therefore that the communication is inadmissible under article 1 of the Optional Protocol, since the author cannot claim to be a victim of the alleged violation.

5. The Human Rights Committee decides:

(a) that the communication is inadmissible under article 1 of the Optional Protocol;

(b) that this decision shall be communicated to the author and his counsel and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued into Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Section 78(2) reads: "Except as authorized by the Act or the regulations, no liquor shall be manufactured, transported, kept or had by any person." Section 89(1) of the Act prohibits possession of liquor by any person under the age of nineteen. It is not disputed that the author was under age at the time of the offence.

[2] Counsel refers to sections 128 and 130(1) of the Liquor Control Act, which read:

> "128. If, on the prosecution of any person charged with committing an offence against this Act, in selling or keeping for sale or giving or keeping or having or purchasing or receiving of liquor, prima facie proof is given that the person had in his possession or charge or control any liquor in respect of or concerning which he is being prosecuted, then, unless the person proves that he did not commit the offence with which he is so charged, he may be convicted of the offence."

> "130(1) The burden of proving the right to have or keep or sell or give or purchase or consume liquor shall be on the person accused of improperly or unlawfully having or keeping or selling or giving or purchasing or consuming the liquor, notwithstanding that the prosecution has given any evidence whatsoever in addition to the prima facie proof referred to in Section 128".

Annex XI

DECISIONS OF THE HUMAN RIGHTS COMMITTEE DECLARING A COMMUNICATION ADMISSIBLE UNDER THE OPTIONAL PROTOCOL

A. Communication No. 845/1999, Kennedy v. Trinidad and Tobago (Decision adopted on 2 November 1999, sixty-seventh session)*

Submitted by	Rawle Kennedy (represented by the London law firm Simons Muirhead & Burton)
Alleged victim	The author
State party	Trinidad and Tobago
Date of communication	7 December 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 November 1999,

Adopts the following:

Decision of admissibility

1 The author of the communication is Mr. Rawle Kennedy, a citizen of Trinidad and Tobago, awaiting execution in the State prison in Port of Spain. He claims to be a victim of violations by Trinidad and Tobago of articles 2, paragraph 3; 6, paragraphs 1, 2 and 4; 7; 9, paragraphs 2 and 3; 10, paragraph 1; 14, paragraphs 1, 3(c) and 5; and 26 of the International Covenant on Civil and Political Rights. He is represented by the London law firm Simons Muirhead & Burton.

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden. The texts of a concurring individual opinion, signed by one member, and of a dissenting opinion, signed by four members are appended to the present document.

The facts as submitted by the author

2.1 On 3 February 1987, one Norris Yorke was wounded in the course of a robbery of his garage. He died of the wounds the following day. The author was arrested on 4 February 1987, charged with murder along with one Wayne Matthews on 9 February 1987, and first brought before a magistrate on 10 February 1987. The author was tried between 14 and 16 November 1988 and was found guilty. The author appealed against his conviction and on 21 January 1992, the Court of Appeal allowed the appeal and ordered a retrial which took place between 15 and 29 October 1993. The author was again found guilty and sentenced to death. A new appeal was subsequently lodged, but the Court of Appeal refused leave to appeal on 26 January 1996, giving its reasons for doing so on 24 March 1998. The author's subsequent petition to the Judicial Committee of the Privy Council was dismissed on 26 November 1998.

2.2 The case for the prosecution was that the victim, Mr. Norris Yorke, was at work in his gas station along with the supervisor, one Ms Shanghie, on the evening of 3 February 1987. After close of business, when Mr. Yorke was checking the cash from the day's sale, the author and Mr. Matthews entered the station. The prosecution alleged that the author asked Ms. Shanghie for a quart of oil, and that when she returned after getting it, she found Mr. Yorke headlocked by the author, with a gun pointing to his forehead. At this point, Mr. Matthews allegedly told the author that Mr. Yorke had a gun which he was reaching for, and then rushed into the room and struck Mr. Yorke on the head several times with a length of wood before he went back out of the room. Mr. Yorke subsequently told the intruders to take the money. Then Ms. Shanghie, on Mr. Yorke's proposal, threw a glass at Mr. Matthews upon which the author pointed the gun at her and told her to be quiet. Mr. Matthews then ran and hit Mr. Yorke on the head a second time causing him to slump down. The two intruders thereafter stole the money and escaped from the scene in a vehicle belonging to Mr. Yorke. Mr. Yorke died the next day from the wounds sustained during the robbery.

2.3 Counsel argues that all available domestic remedies have been exhausted for the purposes of article 5, paragraph 2(b), of the Optional Protocol. While a constitutional motion might be open to the author in theory, it is not available in practice due to the State party's unwillingness or inability to provide legal aid for such motions and to the extreme difficulty of finding a Trinidadian lawyer who would represent an applicant pro bono on a constitutional motion.

The complaint

3.1 The author alleges to be a victim of a violation of article 9, paragraphs 2 and 3, as he was not informed of the charges against him until five days after his arrest and was not brought before a magistrate until six days after his arrest. Counsel cites the Covenant which requires that such actions be undertaken "promptly", and submits that the periods which lapsed in this case do not meet that test reference is made to the Committee's General Comment on article 9[1] and to the jurisprudence of the Committee.[2]

3.2 The author claims to be a victim of a violation of article 14, paragraphs 3(c) and 5, on the ground of undue delays in the proceedings against him. In this regard, counsel calls that it took 1) 21 months from the date on which the author was charged until the beginning of his first trial, 2) 38 months from the conviction until the hearing of his appeal, 3) 21 months from the decision of

the Court of Appeal to allow his appeal until the beginning of the re-trial, 4) 27 months from the second conviction to the hearing of the second appeal, and 5) 26 months from the hearing of the second appeal until the reasoned judgement of the Court of Appeal was delivered. Counsel argues that there is no reasonable excuse as to why the re-trial took place some six years after the offence and why the Court of Appeal took a further four years and four months to determine the matter, and submits that the State party must bear the responsibility for this delay. Reference is made to the Committee's jurisprudence.[3]

3.3 The author claims to be a victim of violations of articles 6, 7, and 14, paragraph 1, on the ground of the mandatory nature of the death penalty for murder in Trinidad and Tobago. Counsel states that the distinction between capital and non-capital murder which has been enacted in many other Common Law countries,[4] has never been applied in Trinidad and Tobago.[5] It is argued that the stringency of the mandatory death penalty for murder is exacerbated by the Murder/Felony Rule which exists in Trinidad and Tobago and under which a person who commits a felony involving personal violence does so at his own risk, and is guilty of murder if the violence results even inadvertently in the death of the victim. The application of the Murder/Felony Rule, it is submitted, is an additional and harsh feature for secondary parties who may not have participated with the foresight that grievous bodily harm or death were possible incidents of that robbery.

3.4 It is submitted that given the wide variety of circumstances in which the crime of murder may be committed, a sentence which is indifferently imposed on every category of murder fails to retain a proportionate relationship between the circumstances of the actual crime and the punishment and therefore becomes cruel and unusual punishment in violation of article 7 of the Covenant. It is similarly submitted that article 6 was violated as imposing the death sentence irrespective of the circumstances was cruel, inhuman and degrading, and an arbitrary and disproportionate punishment which cannot justify depriving someone of the right to life. In addition, it is submitted that article 14, paragraph 1, was violated because the Constitution of Trinidad and Tobago does not permit the author to allege that his execution is unconstitutional as inhuman or degrading or cruel treatment, and because it does not afford the right to a judicial hearing or a trial on the question whether the death penalty should be imposed or carried out for the particular murder committed.

3.5 Counsel submits that the imposition of the death penalty without consideration and opportunity for presentation of mitigating circumstances was particularly harsh in the author's case as the circumstances of his offence were that he was a secondary party to the killing and thus would have been considered less culpable. In this regard, counsel makes reference to a Bill to Amend the Offences Against the Persons Act which has been considered but never enacted by the Trinidadian Parliament. According to counsel, the author's offence would have fallen clearly within the non-capital category had this bill been passed.

3.6 The author claims to be a victim of a violation of article 6, paragraphs 2 and 4, on the ground that the State party has not provided him with the opportunity of a fair hearing in relation to the prerogative of mercy. Counsel states that in Trinidad and Tobago, the President has the power to commute any sentence of death under section 87 of the Constitution, but that he must act in accordance with the advice of a Minister designated by him, who in turn must act in accordance with the advice of the Prime Minister. Under section 88 of the Constitution, there shall also be an Advisory Committee on the Power of Pardon, chaired by the designated Minister.

Under section 89 of the Constitution, the Advisory Committee must take into account certain materials, such as the trial judge's report, before tendering its advice. Counsel submits that in practice, the Advisory Committee is the body in Trinidad and Tobago which has the power to commute sentences of death, and that it is free to regulate its own procedure but that in doing so, it does not have to afford the prisoner a fair hearing or have regard to any other procedural protection for an applicant, such as a right to make written or oral submissions or to have the right to be supplied with the material upon which the Advisory Committee will make its decision.[6]

3.7 Counsel submits that the right to apply for mercy contained in article 6, paragraph 4, of the Covenant must be interpreted so as to be an effective right, i.e. it must in compliance with general principles be construed in such a way that it is practical and effective rather than theoretical or illusory, and it must therefore afford the following procedural rights to a person applying for mercy:

- The right to notification of the date upon which the Advisory Committee is to consider the case

- The right to be supplied with the material which will be before the Advisory Committee at the hearing

- The right to submit representations in advance of the hearing both generally and with regard to the material before the Advisory Committee

- The right to an oral hearing before the Advisory Committee

- The right to place before the Advisory Committee, and have it considered, the findings and recommendations of any international body, such as the United Nations Human Rights Committee.

3.8 With regard to the particular circumstances of the author's case, counsel submits that the Advisory Committee may have met a number of times to consider the author's application without his knowing, and may yet decide to reconvene, without notifying him, without giving him an opportunity to make representations on his behalf and without supplying him with the material to be considered. Counsel argues that this constitutes a violation of article 6, paragraph 4, as well as article 6, paragraph 2, as the Advisory Committee can only make a reliable determination of which crimes constitute "the most serious crimes" if the prisoner is allowed to fully participate in the decision making process.

3.9 The author claims to be a victim of a violation of articles 7 and 10, paragraph 1, as after having been arrested on 4 February 1987 he was tortured and beaten by police officers whilst awaiting to be charged and brought before a magistrate. It is submitted that he suffered a number of beatings and was tortured to admit to the offence. In particular, the author states that he was hit on the head with a traffic sign, jabbed in the ribs with the butt of a rifle, continually stamped on by named police officers, struck in the eyes by a named police officer, threatened with a scorpion and drowning, and denied food. The author states he complained of the beatings and showed his bruises to the court before which he was brought on 10 February 1987, and that the judge ordered that he be taken to hospital after the hearing, but that he nonetheless was denied treatment.

3.10 The author claims to be a victim of a violation of articles 7 and 10, paragraph 1, on the ground that he has been detained, both on remand and on death row, in appalling conditions. It is submitted that for the duration of the periods on remand (21 months before the first trial and 21 months before the second trial), the author was kept in a cell measuring 6 by 9 feet which he shared with between five to ten other inmates. With regard to the period of altogether almost eight years on death row, it is submitted that the author has been subjected to solitary confinement in a cell measuring 6 by 9 feet, containing only a steel bed, table and bench, with no natural light or integral sanitation and only a plastic pail for use as a toilet. The author further states that he is allowed out of his cell only once a week for exercise, that the food is inadequate and almost inedible and that no provisions are made for his particular dietary requirements. Care by doctors or dentists are, despite requests, infrequently made available. Reference is made to NGO reports on the conditions of detention in Trinidad and Tobago, quotations printed in a national newspaper from the General Secretary of the Prison Officers' Association, and the UN Standard Minimum Rules for the Treatment of Prisoners.

3.11 Further to the alleged violation of articles 7 and 10, paragraph 1, on the grounds of the appalling conditions of detention, the author claims that carrying out his death sentence in such circumstances would constitute a violation of his rights under articles 6 and 7. Reference is made to the Judicial Committee of the Privy Council's judgment in Pratt and Morgan v. The Attorney General of Jamaica (1994) 2 AC1, in which it held that prolonged detention under sentence of death would violate, in that case, Jamaica's constitutional prohibition on inhuman and degrading treatment. Counsel argues that the same line of reasoning must be applied in this case with the result that an execution after detention in such circumstances must be unlawful.

3.12 Finally, the author claims to be a victim of a violation of articles 2, paragraph 3, and 14 on the ground that due to lack of legal aid he is de facto being denied the right under section 14(1) of the Trinidadian Constitution to apply to the High Court for redress for violations of his fundamental rights. It is submitted that the costs of instituting proceedings in the High Court are extremely high and beyond the author's financial means and indeed beyond the means of the vast majority of those charged with capital offences. Reference is made to the jurisprudence of the European Court of Human Rights' and the jurisprudence of the Committee.[8]

3.13 With regard to the State party's reservation set forward upon its reaccession to the Optional Protocol on 26 May 1998, the author claims that the Committee has competence to deal with the present communication notwithstanding the fact that it concerns a "prisoner who is under sentence of death in respect of [... matters] relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him".

3.14 Even though the reservation purports to exclude all communications relating to the sentence of death forwarded after 26 August 1998, the author submits that the reservation significantly impairs the competence of the Committee under the Optional Protocol to hear communications as it purports to exclude from consideration a broad range of cases, including many which would contain allegations of violations of non-derogable rights. It is submitted that the reservation therefore is incompatible with the object and purpose of the Protocol and that it is invalid and without effect and thus presents no bar to the Committee's consideration of this communication.

3.15 To support this view, counsel advances several arguments. Firstly, counsel argues that the Preamble to the Optional Protocol as well as its articles 1 and 2 all state that the Protocol gives competence to the Committee to receive and consider communications from individuals subject to the jurisdiction of a State party who claim to be victims of a violation by the State party of any of the rights set forth in the Covenant. A State party to the Protocol thus, it is averred, accepts a single obligation in relation to all of the rights enumerated in the Covenant and cannot by reservation exclude consideration of a violation of any particular right. It is argued that this view is supported by the following points:

- The rights enumerated in the Covenant include non-derogable human rights having jus cogens status. A State party cannot limit the competence of the Committee to review cases which engage rights with such status, and thus a State party cannot, for example, limit communications from prisoners under sentence of death alleging torture.

- The Committee will be faced with real difficulties if it is to deal with communications only in relation to certain rights, as many complaints necessarily involve allegations of violations of several of the Covenant's articles.

- In its approach the Trinidad and Tobago reservation is without precedent and, in any event, there is little or no support for the practice of making reservations rationae personae or ratione materiae in relation to the Optional Protocol.

3.16 Secondly, counsel argues that in determining whether the reservation is compatible with the object and purpose of the Optional Protocol it is appropriate to recall that a State may not withdraw from the Protocol for the purpose of shielding itself from international scrutiny in respect of its substantive obligations under the Covenant. Trinidad and Tobago's reservation would in effect serve that purpose and accordingly allow such an abuse to occur.

3.17 Thirdly, counsel argues that the breadth of the reservation is suspect because it precludes consideration of any communications concerned not just with the imposition of the death penalty as such, but with every possible claim directly or even indirectly connected with the case merely because the death penalty has been imposed.

The State party's submission and counsel's comments thereon

4.1 In its submission of 8 April 1999, the State party makes reference to its instrument of accession to the Optional Protocol of 26 May 1998, which included the following reservation:

> "... Trinidad and Tobago re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 1 thereof to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith."

4.2 The State party submits that because of this reservation and the fact that the author is a prisoner under sentence of death, the Committee is not competent to consider the present communication. It is stated that in registering the communication and purporting to impose interim measures under rule 86 of the Committee's rules of procedure, the Committee has exceeded its jurisdiction, and the State party therefore considers the actions of the Committee in respect of this communication to be void and of no binding effect.

5. In his comments of 23 April 1999, counsel submits that the State party's assertion that the Human Rights Committee has exceeded its jurisdiction in registering the present communication is wrong as a matter of settled international law. It is argued that, in conformity with the general principle that the body to whose jurisdiction a purported reservation is addressed decides on the validity and effect of that reservation, it must be for the Committee, and not the State party, to determine the validity of the purported reservation. Reference is made to the Committee's General Comment No. 24, para. 18[9] and to the Order of the International Court of Justice of 4 December 1998 in Fisheries Jurisdiction (Spain v. Canada).

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 On 26 May 1998, the Government of Trinidad and Tobago denounced the first Optional Protocol to the International Covenant on Civil and Political Rights. On the same day, it reacceded, including in its instrument of reaccession the reservation set out in paragraph 4.1 above.

6.3 To explain why such measures were taken, the State party makes reference to the decision of the Judicial Committee of the Privy Council in Pratt and Morgan v. the Attorney General for Jamaica,[10] in which it was held that "in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment"" in violation of section 17 of the Jamaican Constitution. The effect of the decision for Trinidad and Tobago is that inordinate delays in carrying out the death penalty would contravene section 5, paragraph 2(b), of the Constitution of Trinidad and Tobago, which contains a provision similar to that in section 17 of the Jamaican Constitution. The State party explains that as the decision of the Judicial Committee of the Privy Council represents the constitutional standard for Trinidad and Tobago, the Government is mandated to ensure that the appellate process is expedited by the elimination of delays within the system in order that capital sentences imposed pursuant to the laws of Trinidad and Tobago can be enforced. Thus, the State party chose to denounce the Optional Protocol.

> "In the circumstances, and wishing to uphold its domestic law to subject no one to inhuman and degrading punishment or treatment and thereby observe its obligations under article 7 of the International Covenant on Civil and Political Rights, the Government of Trinidad and Tobago felt compelled to denounce the Optional Protocol. Before doing so, however, it held consultations on 31 March 1998, with the Chairperson and the Bureau of the Human Rights Committee with a view to seeking assurances that the death penalty

cases would be dealt with expeditiously and completed within 8 months of registration. For reasons which the Government of Trinidad and Tobago respects, no assurance could be given that these cases would be completed within the timeframe sought."

6.4 As opined in the Committee's General Comment No. 24, it is for the Committee, as the treaty body to the International Covenant on Civil and Political Rights and its Optional Protocols, to interpret and determine the validity of reservations made to these treaties. The Committee rejects the submission of the State party that it has exceeded its jurisdiction in registering the communication and in proceeding to request interim measures under rule 86 of the rules of procedure. In this regard, the Committee observes that it is axiomatic that the Committee necessarily has jurisdiction to register a communication so as to determine whether it is or is not admissible because of a reservation. As to the effect of the reservation, if valid, it appears on the face of it, and the author has not argued to the contrary, that this reservation will leave the Committee without jurisdiction to consider the present communication on the merits. The Committee must, however, determine whether or not such a reservation can validly be made.

6.5 At the outset, it should be noted that the Optional Protocol itself does not govern the permissibility of reservations to its provisions. In accordance with article 19 of the Vienna Convention on the Law of Treaties and principles of customary international law, reservations can therefore be made, as long as they are compatible with the object and purpose of the treaty in question. The issue at hand is therefore whether or not the reservation by the State party can be considered to be compatible with the object and purpose of the Optional Protocol.

6.6 In its General Comment No. 24, the Committee expressed the view that a reservation aimed at excluding the competence of the Committee under the Optional Protocol with regard to certain provisions of the Covenant could not be considered to meet this test:

> "The function of the first Optional Protocol is to allow claims in respect of [the Covenant's] rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to object and purpose of the first Optional Protocol, even if not of the Covenant"[11] (emphasis added).

6.7 The present reservation, which was entered after the publication of General Comment No. 24, does not purport to exclude the competence of the Committee under the Optional Protocol with regard to any specific provision of the Covenant, but rather to the entire Covenant for one particular group of complainants, namely prisoners under sentence of death. This does not, however, make it compatible with the object and purpose of the Optional Protocol. On the contrary, the Committee cannot accept a reservation which singles out a certain group of individuals for lesser procedural protection than that which is enjoyed by the rest of the

population. In the view of the Committee, this constitutes a discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols, and for this reason the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol. The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol.

6.8 The Committee, noting that the State party has not challenged the admissibility of any of the author's claims on any other ground than its reservation, considers that the author's claims are sufficiently substantiated to be considered on the merits.

7 The Human Rights Committee therefore decides:

(a) that the communication is admissible;

(b) that, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken;

(c) that any explanations or statements received from the State party shall be communicated by the Secretary-General under rule 93, paragraph 3, of the rules of procedure to the author, with the request that any comments which he may wish to make should reach the Human Rights Committee, in care of the High Commissioner for Human Rights, United Nations Office at Geneva, within six weeks of the date of transmittal;

(d) that this decision shall be communicated to the State party, to the author and his representatives.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] HRI/GEN/1/Rev. 3, 15 August 1997, pp. 9 following.

[2] Communication No. R.2/11, Motta v. Uruguay; Communication No. 57/1987, Kelly v. Jamaica; Communication No. 373/1989, Stevens v. Jamaica; Communication No. 597/1994, Grant v. Jamaica.

[3] Communication No. 336/1988, Fillastre v. Bolivia; Communication No. 27/1978, Pinkney v. Canada; Communication No. 283/1988, Little v. Jamaica; Communication Nos. 210/1986 and 225/1987, Pratt and Morgan v. Jamaica; Communication No. 253/1987, Kelly v. Jamaica; Communication No. 523/1992, Neptune v. Trinidad and Tobago.

[4] Reference is made to the United Kingdom's Homicide Act 1957 which restricted the death penalty to the offence of capital murder (murder by shooting or explosion, murder done in the furtherance of theft, murder done for the purpose of resisting arrest or escaping from custody, and murders of police and prison officers on duty) pursuant to section 5 and murder committed on more than one occasion pursuant to section 6.

[5] The law in Trinidad and Tobago does however contain provisions reducing the offence of murder to one of manslaughter in cases of murder committed with diminished responsibility or under provocation.

[6] Counsel states that these principles were set forth by the Judicial Committee of the Privy Council in Reckley v. Minister of Public Safety (No. 2) (1996) 2WLR 281 and De Freitas v. Benny (1976) A.C.

[7] Golder v. UK (1975) A18, Airey v. Ireland (1979) A32.

[8] Communication No. 377/1989, Currie v. Jamaica.

[9] HRI/GEN/1/Rev. 3, 15 August 1997, p. 48.

[10] 2 A.C. 1, 1994.

[11] HRI/GEN/1/Rev 3, 15 August 1997, p. 46.

APPENDIX

Individual opinion (dissenting) by Nisuke Ando, P N. Bhagwati, Eckart Klein and David Kretzmer

1. We agree that it was within the Committee's competence to register the present communication and to issue a request for interim measures under rule 86 of the Committee's Rules of Procedure so as to allow the Committee to consider whether the State party's reservation to the Optional Protocol makes the communication inadmissible. However, we cannot accept the Committee's view that the communication is admissible.

2. Recognition by a State party to the Covenant of the Committee's competence to receive and consider communications from individuals subject to the State party's jurisdiction rests solely on the ratification of, or the accession to, the Optional Protocol. Article 1 of the Optional Protocol states expressly that no communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the Optional Protocol.

3. The Optional Protocol is a distinct international treaty, which is deliberately separated from the Covenant, in order to enable States to accept the provisions of the Covenant without being obliged to accept the Committee's competence to consider individual communications. In contrast to the Covenant, which includes no provision allowing denunciation, article 12 of the Optional Protocol expressly permits the denunciation of the Protocol. It goes without saying that denunciation of the Optional Protocol can have no legal impact whatsoever on the State party's obligations under the Covenant itself.

4. In the present case the State party exercised its prerogative to denounce the Optional Protocol. By its reaccession to the Optional Protocol, it reaffirmed its commitment to recognize the competence of the Committee to receive and consider communications from individuals. However, this act of reaccesion was not unrestricted. It was accompanied by the reservation which concerns us here.

5. The Optional Protocol itself does not govern the permissibility of reservations to its provisions. In accordance with rules of customary international law that are reflected in article 19 of the Vienna Convention on the Law of Treaties, reservations can therefore be made, provided they are compatible with the object and purpose of the Optional Protocol. Thus, a number of States parties have made reservations to the effect that the Committee shall not have competence to consider communications which have already been considered under another procedure of international investigation or settlement. These reservations have been respected by the Committee.

6. The object and purpose of the Optional Protocol is to further the purposes of the Covenant and the implementation of its provisions by allowing international consideration of claims that an individual's rights under the Covenant have been violated by a State party. The purposes and implementation of the Covenant would indeed best be served if the Committee had the competence to consider every claim by an individual that his or her rights under the Covenant had been violated by a State party to the Covenant. However, assumption by a state of the obligation to ensure and protect all the rights set out in the Covenant does not grant competence to the

Committee to consider individual claims. Such competence is acquired only if the State party to the Covenant also accedes to the Optional Protocol. If a State party is free either to accept or not accept an international monitoring mechanism, it is difficult to see why it should not be free to accept this mechanism only with regard to some rights or situations, provided the treaty itself does not exclude this possibility. All or nothing is not a reasonable maxim in human rights law.

7. The Committee takes the view that the reservation of the State party in the present case is unacceptable because it singles out one group of persons, those under sentence of death, for lesser procedural protection than that enjoyed by the rest of the population. According to the Committee's line of thinking this constitutes discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols. We find this argument unconvincing.

8. It goes without saying that a State party could not submit a reservation that offends peremptory rules of international law. Thus, for example, a reservation to the Optional Protocol that discriminated between persons on grounds of race, religion or sex, would be invalid. However, this certainly does not mean that every distinction between categories of potential victims of violations by the State party is unacceptable. All depends on the distinction itself and the objective reasons for that distinction.

9. When dealing with discrimination that is prohibited under article 26 of the Covenant, the Committee has consistently held that not every differentiation between persons amounts to discrimination. There is no good reason why this approach should not be applied here. As we are talking about a reservation to the Optional Protocol, and not to the Covenant itself, this requires us to examine not whether there should be any difference in the substantive rights of persons under sentence of death and those of other persons, but whether there is any difference between communications submitted by people under sentence of death and communications submitted by all other persons. The Committee has chosen to ignore this aspect of the matter, which forms the very basis for the reservation submitted by the State party.

10. The grounds for the denunciation of the Optional Protocol by the State party are set out in paragraph 6.3 of the Committee's views and there is no need to rehearse them here. What is clear is that the difference between communications submitted by persons under sentence of death and others is that they have different results. Because of the constitutional constraints of the State party the mere submission of a communication by a person under sentence of death may prevent the State party from carrying out the sentence imposed, even if it transpires that the State party has complied with its obligations under the Covenant. In other words, the result of the communication is not dependent on the Committee's views - whether there has been a violation and if so what the recommended remedy is - but on mere submission of the communication. This is not the case with any other category of persons who might submit communications.

11. It must be stressed that if the constitutional constraints faced by the State party had placed it in a situation in which it was violating substantive Covenant rights, denunciation of the Optional Protocol, and subsequent reaccession, would not have been a legitimate step, as its object would have been to allow the State party to continue violating the Covenant with impunity. Fortunately, that is not the situation here. While the Committee has taken a different view from that taken by the Privy Council (in the case mentioned in para. 6.3 of the Committee's views) on the question of

whether the mere time on death row makes delay in implementation of a death sentence cruel and inhuman punishment, a State party which adheres to the Privy Council view does not violate its obligations under the Covenant.

12. In the light of the above, we see no reason to consider the State party's reservation incompatible with the object and purpose of the Optional Protocol. As the reservation clearly covers the present communication (a fact that is not contested by the author), we would hold the communication inadmissible.

13. Given our conclusion that this communication is inadmissible for the reasons set out above, we need not have dealt with a further issue that arises from the Committee's views: the effect of an invalid reservation. However, given the importance of this question and the fact that the Committee itself has expressed its views on this issue we cannot ignore it.

14. In para. 6.7 of its Views the Committee states that it considers that the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol. Having reached this conclusion the Committee adds that "[t]he consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol." It gives no reason for this "consequence", which is far from self-evident. In the absence of an explanation in the Committee's Views themselves, we must assume that the explanation lies in the approach adopted by the Committee in its General Comment No. 24, which deals with reservations to the Covenant.

15. In General Comment No. 24 the Committee discussed the factors that make a reservation incompatible with the object and purpose of the Covenant. In para. 18 the Committee considers the consequences of an incompatible reservation and states:

> "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation."

It is no secret that this approach of the Committee has met with serious criticism. Many experts in international law consider the approach to be inconsistent with the basic premises of any treaty regime, which are that the treaty obligations of a state are a function of its consent to assume those obligations. If a reservation is incompatible with the object and purpose of a treaty, the critics argue, the reserving state does not become a party to the treaty unless it withdraws that reservation. According to the critics' view there is no good reason to depart from general principles of treaty law when dealing with reservations to the Covenant.

16. It is not our intention within the framework of the present case to reopen the whole issue dealt with in General Comment No. 24. Suffice it to say that even in dealing with reservations to the Covenant itself the Committee did not take the view that in every case an unacceptable reservation will fall aside, leaving the reserving state to become a party to the Covenant without benefit of the reservation. As can be seen from the section of General Comment No. 24 quoted above, the Committee merely stated that this would normally be the case. The normal assumption will be that the ratification or accession is not dependent on the acceptability of the reservation and that the unacceptability of the reservation will not vitiate the reserving state's agreement to be a

party to the Covenant. However, this assumption cannot apply when it is abundantly clear that the reserving state's agreement to becoming a party to the Covenant is dependent on the acceptability of the reservation. The same applies with reservations to the Optional Protocol.

17. As explained in para. 6.2 of the Committee's Views, on 26 May, 1998 the State party denounced the Optional Protocol and immediately reacceded with the reservation. It also explained why it could not accept the Committee's competence to deal with communications from persons under sentence of death. In these particular circumstances it is quite clear that Trinidad and Tobago was not prepared to be a party to the Optional Protocol without the particular reservation, and that its reaccession was dependent on acceptability of that reservation. It follows that if we had accepted the Committee's view that the reservation is invalid we would have had to hold that Trinidad and Tobago is not a party to the Optional Protocol. This would, of course, also have made the communication inadmissible.

18. In concluding our opinion we wish to stress that we share the Committee's view that the reservation submitted by the State party is unfortunate. We also consider that the reservation is wider than required in order to cater to the constitutional constraints of the State party, as it disallows communications by persons under sentence of death even if the time limit set by the Privy Council has already been exceeded (as would seem to be the case in the present communication). We understand that since the State party's denunciation and reaccession there have been developments in the jurisprudence of the Privy Council that may make the reservation unnecessary. These factors do not affect the question of the compatibility of the reservation with the object and purpose of the Optional Protocol. However, we do see fit to express the hope that the State party will reconsider the need for the reservation and withdraw it. We also stress the obvious: the acceptability of the reservation in no way affects the duty of the State party to meet all its substantive obligations under the Covenant. The rights under the Covenant of persons under sentence of death must be ensured and protected in all circumstances.

(Signed) N. Ando

(Signed) P. N. Bhagwati

(Signed) E. Klein

(Signed) D. Kretzmer

[Done in English, French and Spanish, the English being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual concurring opinion by Committee member Louis Henkin

I concur on the result

(Signed) Louis Henkin

[Done in English, French and Spanish, the English being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Annex XII

SUMMARY OF THE ANNOUNCEMENT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS CONCERNING THE ESTABLISHMENT OF A PETITION TEAM

The evolution of the treaty sytem and better awareness by people of their rights have led to challenging tasks for the treaty-monitoring bodies, especially the Human Rights Committee (HRC). The focus on universal ratification planned by the Secretary-General during the Millennium Assembly can only increase this pressure and will necessitate a careful re-examination of resource issues by the States parties.

The High Commissioner's first Annual Appeal, in January 2000, launched a comprehensive two-year programme to improve the servicing of the entire treaty monitoring system. One essential component is the enhancement of the capacity of the OHCHR to handle individual complaints of human rights violations. The Committee has welcomed, with appreciation, the news that a petitions team is to be established within the SSB to deal with individual procedures under the ICCPR, CAT, and CERD. Staff is being recruited to provide additional support for the team, one of whose priorities will be to tackle the backlog of communications to the HRC, as well as dealing with communications to the other treaty bodies.

The overall purpose is to increase efficiency, coordinate work, share legal and linguistic expertise and develop comparative analyses of treaty body jurisprudence. A process of staff recruitment to provide additional support has been initiated: a Russian speaker, a French mother tongue and a common law lawyer.

The new structure is to be designed to ensure proper coordination between the Committee's reporting activities in the form of its concluding observations and views resulting from consideration of communications: there should be information flow and cross-fertilization between the two functions, as well as the elaboration of general comments and proper follow-up.

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